United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 18,676

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF MARYLAND for the use of
MARY JANE MEYER, et al.,

Appellees.

834

No. 18,677

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF MARYLAND for the use of
VANCE LEWMAN BRADY, et al.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

1. Relevant Docket Entries

[In Civ. No. 1236-59]

1959

May 5 - Complaint, appearance.

July 2 - Answer of defendant to complaint.

1961

May 4 - Order consolidating CA 1236-59 with CA 1237-59 and CA 1238-59 for trial and setting causes for trial on the preliminary issue of agency only on 5/29/61. (AC/N) (N) Youngdahl, J.

May 26 - Pretrial Proceedings.

May 29 - Hearing commenced on issue of agency; respited to May 31st (Rept: M.A. Deeds) Matthews, J.

June 1 - Hearing resumed; concluded and submitted; Rep. Edna Remig. Matthews, J.

Sept. 7 - Memorandum in re: finding for pltffs on preliminary issue. (N) Matthews, J.

Oct. 27 - Findings of Fact and Conclusions of Law. (N) Matthews, J.

Nov. 2 - Pretrial Proceedings Pretrial Examiner

Nov. 13 - Hearing begun; respited until 11:30 A.M., November 14, 1961. Holtzoff, J.

Nov. 21 - Hearing resumed; finding for pltf in the amount of $248,000.00; order to be presented. (Rep. C. Nevitt) Holtzoff, J.

Dec. 6 - Findings of Fact as to Issues of Damages. (N) Holtzoff, J.

Dec. 6 - Judgment for plaintiffs against the U.S.A.; Mary Jane Meyer $85,000.00; Paul Jeffrey Meyer, $25,000.00; Susan Lynn Meyer, $30,000.00; Pamela Ann Meyer, $30,000.00; Austin F. Canfield, Jr., Ancillary Administrator of Paul Frank Meyer, $1,000.00; Vance Lewman Brady, $175,000.00; Virginia Brady, $35,000.00; Kendall Jesse Brady, Jr. $38,000.00; Capital Airlines, Inc., $1,216,050.00; Austin F. Canfield, Jr., Ancillary Administrator of Kendell Jesse Brady, $1,000.00; judgment for pltff, Capital Airlines, Inc. on counterclaim of U.S.C. (N) (Original filed in 1236-59) Holtzoff, J.

1961

Dec. 11 - Order denying defts motion for further consideration. (N) Holtzoff, J.

1962

Feb. 1 - Notice of appeal by deft from order 12-6-62; Copy to Galiher & Stewart. (No fee Govt)

July 9 - Certified copy judgment U.S.C.A. affirming decision of U.SD.C. in cases CA 1236-59 & 1237-59 & reversing & remanding CA 1238-59 for further proceedings, opinion attached.

July 10 - Receipt from U.S.C.A. for return of original record, transcripts, depositions & original Exhibits, to U.S.D.C.

1963

Sept. 16 - Judgment pursuant to opinion and mandate of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the District Court on the issue of liability, remanding case for new findings on the issue of damages. (N) Holtzoff, J.

1964

Apr. 1 - Motion of plaintiffs to re-tax costs and to require defendant to pay interest on judgment, P&A, c/m 4-1-64, MC 4-1-64. (filed in 1237-59)

Apr. 13 - Opposition of defendant to motion to retax costs. P&A's, c/m 4-10-64.

Apr. 20 - Order directing defendant to pay interest on the judgments entered herein in accordance with the provision of 28 U.S.C.A. 2411 (b) (N) Holtzoff, J.

May 14 - Opinion consisting of oral opinion of Court of 4-20-64 (N) Holtzoff, J.

June 2 - Notice of Appeal by defendant from order of April 20, 1964, Copy to R. Galiher (Gov't.)

2. Complaint in Civil Action No. 1236-59.
[Complaint in Civil No. 1237-59 is substantially identical except for names].

COMPLAINT FOR WRONGFUL DEATH, FOR DAMAGES SUSTAINED IN LIFETIME OF DECEASED AND FOR FUNERAL EXPENSES

COUNT I

The plaintiff, STATE OF MARYLAND, for the use of the above named beneficiaries, says:

1. This court has jurisdiction of this cause under Article 67, Sections 1, 3 and 4, Annotated Code of Maryland, herein adopted by reference, and under the Federal Tort Claims Act, Title 4, Public Law 601, August 2nd, 1946, 60 Stat. 843, 28 U.S.C.A., Section 921, Section 1346 (b), 1402 (b), 2401 (b), 2671 and 2674 of the U.S. Code.

2. That on May 20, 1958, the plaintiff's decedent PAUL FRANK MEYER, was employed by Capital Airlines, Inc., a corporation, licensed common carrier of passengers by airplane, and on said date, said decedent, as co-pilot of a crew of said common carrier, was operating or assisting in the operation of one of the airplanes of said Capital Airlines, Inc., which was then carrying passengers and was being flown in a general easterly direction on Flight 300, a regularly scheduled flight over said State of Maryland, within a commercial airway designated by the defendant UNITED STATES OF AMERICA, through its duly constituted agent, Federal Aviation Agency, formerly known as Civil Aeronautics Administration.

3. That at the time of the occurrence hereinafter complained of and at all times prior thereto the said PAUL FRANK MEYER was in the exercise of ordinary care for his own safety.

4. That on said date, the defendant UNITED STATES OF AMERICA, by its agent and servant, JULIUS R. McCOY, was operating a T-33 jet airplane in the vicinity of Brunswick, Maryland, overtaking the said Capital Airlines airplane from the left rear.

5. On and long prior to said date and at the time of the occurrence hereinafter complained of, the defendant UNITED STATES OF AMERICA controlled the civil airways and air space over the UNITED STATES OF AMERICA, and the use thereof by all aircraft, including the space between the

triangle formed by Pittsburgh, Pennsylvania; Baltimore, Maryland; and Washington, D. C., and the areas adjacent to the said triangle over the States of Pennsylvania, West Virginia, and Maryland, and operated and controlled the control towers, and control centers at and near the airports located at Pittsburgh, Pennsylvania; Baltimore, Maryland; and Washington, D. C.; that from said control towers and control centers and from the Federal Aviation Agency in Washington, D. C., formerly known as Civil Aeronautics Administration, the movement of all aircraft, both civil and military, in said air space, was governed and controlled by the UNITED STATES OF AMERICA, including the take-off, flight, and landing of the said Capital Airlines Flight 300, and the flight of the said jet airplane, T-33, at the time of the occurrence hereinafter complained of.

6. That on said date and for several years prior thereto the use of the civil airways over the UNITED STATES OF AMERICA by civil aircraft and by military aircraft had become so dense that there had been numerous collisions and near-misses within or near the said civil airways, between civil aircraft, and between civil and military aircraft, and there was, on and prior to said date, very great likelihood of such further collisions between aircraft in or near said airways, and, accordingly, great need for watchful separation of traffic in and near said airways and for careful control of both commercial and military flights within or near said civil airways; that the said situation was known by the UNITED STATES OF AMERICA on and prior to said date.

7. That the Capital Airlines airplane involved in the collision herein referred to, and the T-33 jet airplane were, at the time of the occurrence in question and prior thereto, subject to the regulation and control of the said UNITED STATES OF AMERICA, through its duly constituted agent, Federal Aviation Agency, formerly known as Civil Aeronautics Administration, in their operation and flight; that the said civil aircraft was on a route and at a place to which it had been directed by the agents and employees of the said UNITED STATES OF AMERICA and where said employees then had facilities to watch, guide, and separate the said Capital Airlines airplane and the said T-33 jet airplane, and had the exclusive right, authority and power to regulate and separate said airplanes and to keep and maintain them on routes and paths, separate, apart, and at a safe distance from each other.

8. That on said date, the said defendant UNITED STATES OF AMERICA, by its agent and servant, JULIUS R. McCOY, at the time of and prior to the occurrence hereinafter complained of:

(a) Carelessly and negligently maintained, operated and flew said jet airplane.

(b) Carelessly and negligently flew said jet airplane at a high, dangerous, and excessive rate of speed.

(c) Carelessly and negligently failed to keep a reasonably careful lookout for other airplanes that might be in the vicinity of the said jet airplane.

(d) Carelessly and negligently violated certain regulations of the Federal Aviation Agency, formerly known as Civil Aeronautics Administration.

(e) Carelessly and negligently failed to give the right-of-way to the plaintiff's airplane.

(f) Carelessly and negligently failed to take corrective measures which would have avoided the collision of airplanes and the accident hereinafter complained of.

(g) Carelessly and negligently turned and changed the course of flight of said jet airplane and flew it towards and into the said Capital Airlines airplane, which was then moving in a straight and almost level flight.

9. On and prior to the said date, and at the time of said occurrence, the said jet airplane was owned, controlled and operated by the defendant UNITED STATES OF AMERICA, through its agents, servants, employees, and officers; and the UNITED STATES OF AMERICA, through its agents, and servants, was additionally negligent in the following respects at the time of and prior to said occurrence:

(a) Carelessly and negligently permitted the said jet airplane to be operated into and through commercial airways without giving reasonably adequate instructions to the pilot thereof.

(b) Carelessly and negligently failed to prescribe, establish, and compel compliance with, reasonable rules and regulations governing the times, speeds, places, and methods of operation in the area aforesaid over the State of Maryland, of said jet airplane and other jet airplanes owned by the UNITED STATES OF AMERICA, although it then knew, or in the exercise of ordinary care could have known, of the necessity for the establishment of and compliance with such rules and regulations from the standpoint of safety of other aircraft operating in that area.

(c) Carelessly and negligently, although it knew or in the exercise of ordinary care could have known that the said jet airplane was likely to be flown in commercial airlanes, in which slower moving commercial airplanes were likely and liable to be traveling, failed and neglected to give reasonably adequate instructions to any person or persons who would be likely to fly the said jet airplane in said airlanes.

(d) Carelessly and negligently permitted and allowed the said jet airplane to be operated and flown in commercial airlanes when the operation of the said jet airplane in said airlanes, because of its great speed, rendered it dangerous and unsafe to slower moving commercial aircraft which were likely and liable to be using the said airlanes at the said time.

(e) Carelessly and negligently permitted the said JULIUS R. McCOY to fly said jet airplane when it knew or in the exercise of ordinary care could have known he would be likely and liable to operate the said airplane in a dangerous, reckless and unsafe fashion.

(f) Carelessly and negligently failed to separate and control the said Capital Airlines airplane and the T-33 jet airplane.

(g) Carelessly and negligently failed to watch, separate and guide the said Capital Airlines airplane and the said T-33 jet airplane.

(h) Carelessly and negligently failed to give reasonable warning to the pilots of the said Capital Airlines airplane of the approach of said jet airplane in close proximity to the Capital Airlines airplane.

10. That said negligent acts or omissions complained of occurred in both the State of Maryland and in the District of Columbia.

11. As a direct and proximate result of the negligence of the said defendant, the said jet airplane overtook and collided with the said Capital Airlines airplane in which the said PAUL FRANK MEYER then was, damaging the said Capital Airlines airplane, causing it to brust [sic] into flames, and to crash to the ground, and as a result thereof, the said PAUL FRANK MEYER was injured and died on May 20, 1958, in the State of Maryland.

12. That the said PAUL FRANK MEYER then left surviving MARY JANE MEYER, his widow, and PAUL JEFFREY MEYER, SUSAN LYNN MEYER, and PAMELA ANN MEYER, his infant children, and that as a result of the death of PAUL FRANK MEYER, his said equitable plaintiffs, his widow and infant children, have been deprived of the maintenance and support furnished to them by the said PAUL FRANK MEYER, thereby causing the equitable plaintiffs to suffer great pecuniary loss and damage, thereby occasioning the bringing of this action; and as damages so resulting the plaintiff, STATE OF MARYLAND, claims the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).

WHEREFORE, plaintiff, STATE OF MARYLAND, for the use of MARY JANE MEYER, widow, and PAUL JEFFREY MEYER, SUSAN LYNN MEYER, and PAMELA ANN MEYER, infant children of said decedent, demands judgment against the defendant UNITED STATES OF AMERICA in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00), together with costs.

COUNT II

1. This court has jurisdiction of this action under Article 75, Section 30, and Article 93, Section 111, Annotated Code of Maryland, incorporated herein by reference.

2. That plaintiff adopts and incorporates by reference provisions contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Count I.

3. That AUSTIN F. CANFIELD, JR., is the duly appointed and acting Ancillary Administrator of the Estate of PAUL FRANK MEYER, Deceased, as a result of his appointment by the United States District Court for the District of Columbia.

4. That the funeral expenses incurred for the deceased amounted to a sum in excess of ONE THOUSAND DOLLARS (1,000.00) for which he requests reimbursement in the amount of ONE THOUSAND DOLLARS ($1,000.00) as provided by the aforementioned Statute.

5. That the said PAUL FRANK MEYER was subjected to and endured conscious pain and suffering, for which plaintiff claims TEN THOUSAND DOLLARS ($10,000.00).

WHEREFORE, plaintiff, AUSTIN F. CANFIELD, JR., Ancillary Administrator of the Estate of PAUL FRANK MEYER, Deceased, demands judgment against the defendant UNITED STATES OF AMERICA

for the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00), together with costs of this action.

/s/ RICHARD W. GALIHER

/s/ LOUIS G. DAVIDSON
Attorneys for Plaintiff

3. Answer in Civil Action No. 1236-59.
[Answer in Civil No. 1237-59 is substantially identical except for names].

ANSWER OF DEFENDANT, UNITED STATES OF AMERICA

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the complaint.

THIRD DEFENSE

As to Count I.

1. Defendant denies that the Court has jurisdiction of this action, and otherwise is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph No. 1 of the complaint.

2. Defendant admits, respecting the allegations of paragraph No. 2, that on the date stated Flight 300 of Capital Airlines, Inc. was proceeding within a civil airway in the State of Maryland, but defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the said paragraph, and therefore denies them.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs Nos. 3 and 12 of the complaint, and therefore denies them.

4. Defendant denies all of the allegations contained in paragraphs Nos. 4, 6, 7, 8 and 10 of the complaint.

5. Defendant denies the allegations contained in paragraph No. 5 of the complaint, except that it states that it exercises certain regulatory functions with respect to air traffic in the civil airways and air space over the United States; that it operated and controlled certain control towers and air traffic control centers at or near the Pittsburgh, Baltimore and Washington National Airports; and that it issued certain air traffic clearances regarding takeoff and flight of Capital Airlines Flight 300 on said date.

6. Defendant denies the allegations contained in paragraph No. 9 of the complaint, and states that the jet plane, type T-33, No. 35966, owned by the defendant, the United States of America, was, at the said time and place, in the exclusive custody, possession and control of the Air National Guard of the State of Maryland, and its agents, servants or employees.

7. Defendant denies all of the allegations contained in paragraph No. 11 of the complaint, except that it admits that a person known as Paul Frank Meyer died of injuries suffered in a mid-air collision of aircraft at the said time and place.

As to Count II:

8. Defendant denies all of the allegations contained in paragraph No. 1 of Count II of the complaint.

9. Defendant repeats and realleges, respecting the allegations of paragraph No. 2 of Count II, each and every allegation made herein as to Count I of the complaint.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs Nos. 3, 4 and 5 of Count II of the complaint.

FOURTH DEFENSE

If plaintiffs suffered injuries, they were not caused by a negligent or wrongful act or omission of an employee of the United States while acting within the scope or office of his employment.

FIFTH DEFENSE

Any damages sustained or suffered by the plaintiffs at

the time and place and on the occasion mentioned hereinabove were caused or were contributed to by the negligence of Paul Frank Meyer, plaintiffs' decedent.

SIXTH DEFENSE

The claims asserted in the complaint fall within the exclusionary provisions of the Federal Tort Claims Act, 28 U.S.C. 2680.

WHEREFORE, the defendant demands that the complaint herein be dismissed with costs.

Oliver Gasch
United States Attorney

4. Judgment entered December 6, 1961.

JUDGMENT

This cause having come on for hearing, it is this 6th day of December 1961

ORDERED THAT

Mary Jane Meyer recover of the defendant United States of America the sum of $85,000.00,

Paul Jeffrey Meyer, recover of the defendant United States of America the sum of $25,000.00,

Susan Lynn Meyer recover of the defendant United States of America the sum of $30,000.00,

Pamela Ann Meyer recover of the defendant United States of America the sum of $30,000.00; and it is further

ORDERED THAT Austin F. Canfield, Jr., Ancillary Administrator of the Estate of Paul Frank Meyer, recover of the defendant United States of America the sum of $1,000.00, and it is further

ORDERED THAT

Vance Lewman Brady recover of the defendant United States of America the sum of $175,000.00,

Virginia Brady recover of the defendant United States of America the sum of $35,000.00,

Kendall Jesse Brady, Jr., recover of the defendant United States of America the sum of $38,000.00, and it is further

ORDERED THAT plaintiff Capital Airlines, Inc., recover of the defendant United States of America the sum of $1,216,-050.00, and it is further

ORDERED THAT Austin F. Canfield, Jr., Ancillary Administrator of the Estate of Kendall Jesse Brady, recover of the defendant United States of America the sum of $1,000.00, and it is further

ORDERED THAT judgment be and is hereby entered in favor of plaintiff Capital Airlines, Inc., on the Counterclaim of defendant United States of America.

ALEXANDER HOLTZOFF
Judge

5. Judgment of the court of appeals, entered June 13, 1963.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that:

(1) The portion of the judgment of the District Court on appeal in Nos. 16953 and 16954 is affirmed; and

(2) The portion of the judgment of the District Court on appeal in No. 16955 is reversed, and this case is hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Circuit Judge FAHY.

Dated: June 13, 1963.

Circuit Judge Danaher would affirm No. 16955 and accordingly dissents from the court's reversal and remand of that case.

6. Order on the mandate of the court of appeals, filed September 16, 1963.

ORDER

It appearing to the court that pursuant to the opinion and mandate of the United States Court of Appeals for the District of Columbia Circuit in United States of America, Appellant v. State of Maryland, for the Use of Mary Jane Meyer, Et Al., Appellees, No. 16953, United States of America, Appellant v. State of Maryland, for the Use of Vance Lewman Brady, widow, Et Al., Appellees, No. 16954, and United States of America, Appellant v. Capital Airlines, Inc., a Corporation, Appellee, No. 16955, this court on June 13th, 1963, affirmed the judgment in the case of United States of America, Appellant, v. State of Maryland, for the Use of Mary Jane Meyer, Et Al., Appellees, No. 16953, and the judgment in the case of United States of America, Appellant v. State of Maryland, for the use of Vance Lewman Brady, widow, Et Al., Appellees, No. 16954, and further affirmed the judgment in the case of United States of America, Appellant, v. Capital Airlines, Inc., a Corporation, Appellee, No. 16955, on the issue of liability but remanded said case to this court for new findings on the issue of damages it is by the court this 16 day of September, 1963,

ORDERED, that judgment be and the same is hereby entered in each of the foregoing cases, pursuant to the opinion and mandate of the United States Court of Appeals for the District of Columbia Circuit.

/s/ Alexander Holtzoff
Judge

Copy of the above Order mailed to counsel for the United States of America, at their last known post office address this 16th day of September, 1963.

/s/ R. W. Galiher
Richard W. Galiher

7. Plaintiffs' motion to require defendant to pay interest on judgment, filed April, 1964.

MOTION TO RE-TAX COSTS AND TO REQUIRE DEFENDANT TO PAY INTEREST ON JUDGMENT

Comes now the plaintiffs, by their attorneys, and move the Court to re-tax the costs allowed by the Clerk in these consolidated cases, and to enter an order requiring the defendant to pay interest on the final judgments in accordance with the provisions of Title 28, Section 2411(b), United

States Code Annotated.

/s/ Richard W. Galiher
Richard W Galiher

/s/ William E. Stewart, Jr.
William E. Stewart, Jr.,
1215 19th Street, N.W.
Washington 36, D.C.

/s/ Louis G. Davidson
Louis G Davidson
100 N. LaSalle Street
Chicago 2, Illinois

/s/ Peter J. McBreen
Peter J. McBreen
141 W. Jackson Boulevard
Chicago 4, Illinois

Attorneys for Plaintiffs

8. Opinion of the court, rendered April 20, 1964.

OPINION OF THE COURT

THE COURT: The plaintiffs recovered judgment in a wrongful death action brought against the United States under the Federal Tort Claims Act. In view of the fact that the accident resulting in the death of the deceased took place in Maryland, the action is governed by the Maryland wrongful death statute. A judgment was rendered awarding certain sums of money to the widow and to the children of the deceased. Each of the amounts awarded amounts to less than $100,000. The aggregate amount of all of the damages awarded is considerably in excess of $100,000. The plaintiffs move that interest be added to the judgment at the rate of four per cent per annum from the date of the judgment.

The Federal Tort Claims Act, 28 United States Code 2411(b), provides that on all final judgments rendered against the United States under the Federal Tort Claims Act interest shall be computed at the rate of four per cent per annum from the date of the judgment up to but not exceeding 30 days after the approval of any appropriation act providing for payment of the judgment. Under this provision of law interest is clearly payable on these judgments.

The Government, however, in opposition to the motion relies on an exception to that statute contained in 31 United States Code 724(a). This provision was a part of an appropriation act rather than permanent legislation, but it is understood that it has been carried in the appropriation acts from year to year. It appropriates a lump sum of money for the payment of judgments against the United States not in excess of $100,000 and further provides that whenever a judgment of a District Court is payable from this appropriation interest should be paid thereon only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance.

In this instance such a transcript has not been filed and therefore it is claimed by the Government that no interest is payable on the judgment.

The question resolves itself into this: Was the judgment involved in this case for less or more than $100,000. If it was for more than that amount, interest is payable; if it was for less, then interest is not payable.

As stated before, while each of the beneficiaries, that is, the wife and the children, received less than $100,000, the sum total awarded by the judgment is in excess of that amount.

The nature of the action must be determined under the law of Maryland. The Annotated Code of Maryland, Article 67, Section 4, relates to actions for wrongful death. It provides, first, that every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, or if there be no such person or persons entitled, then any person related to the deceased by blood or marriage who as a matter of fact was wholly dependent upon the person whose death shall have been so caused. The statute then goes on to provide that every such action shall be brought by and in the name of the State of Maryland for the use of the person or persons entitled to damages. It also provides that not more than one action shall lie for and in respect of the same subject matter of complaint. It also requires that damages shall be allocated respectively to the parties for whom and for whose benefit the action is brought.

It also follows, therefore, that only one action lies for the wrongful death of any person under the Maryland statute. That action is brought in the name of the State of Maryland. To be sure, it is brought for the benefit of dependents, but there is a single action and a single judgment, although the judgment directs payment of specific sums to the various dependents. Actually what the Court does first is to determine the total amount of damages to be awarded and then apportions that amount among the dependents. That was the process followed by the Court in this action.

It was also the process followed by Judge Thomsen of the United States District Court for the District of Maryland in another wrongful death case, State of Maryland v. Thomas, 173 F. Supp. 568. Thus, Judge Thomsen in his conclusion states that in the cause of action for the death of Mary S. Gaegler the damages are $37,000, which should be apportioned $20,000 to the surviving husband and $17,000 to the surviving son.

While the question is not free from doubt, nevertheless the Court is of the opinion that the final judgment in this case must be deemed to be in excess of $100,000, and therefore the limitation on interest contained in 31 United States Code 724(a) is not applicable.

Accordingly, the plaintiffs' motion for the assessment of interest at four per cent from the date of the judgment is granted.

You may submit an appropriate order.

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Certified as the official transcript of the Oral Opinion.

/s/ Gerald Nevitt
Official Court Reporter

9. Order of the court, entered April 20, 1964.

ORDER

Upon consideration of the motion to re-tax costs and to require defendant to pay interest on judgment, and it appearing the plaintiffs have withdrawn their motion to re-tax costs, it is by the court, this 20 day of April, 1964

ORDERED that the motion to require defendant to pay interest on judgments, in accordance with the provisions of Title 28, Section 2411(b), United States Code Annotated be and is hereby granted, and the defendant, the United States of America, be and is hereby directed to pay the judgments entered in these two cases, together with interest, which shall be computed at the rate of 4% per annum from the date of the judgments up to, but not exceeding, thirty days after the date of approval of any appropriation act providing for the payment of the judgments.

/s/ Alexander Holtzoff
Judge

10. Notice of appeal.

NOTICE OF APPEAL

Notice is hereby given this 2nd day of June, 1964, that the United States, party defendant hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of April, 1964 in favor of Plaintiff against said Defendant.

/s/ David C. Acheson
DAVID C. ACHESON
Attorney for

United States (Defendant)

BRIEF FOR APPELLANT

IN THE
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. DOUGLAS,
Assistant Attorney General,
DAVID C. ACHESON,
United States Attorney,
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys,
Department of Justice, Washington, D.C.
20530

I N D E X

CITATIONS

Cases:

* [Authorities relied upon].

* [Authorities primarily relied upon].

QUESTIONS PRESENTED

1. Whether a district court has authority, more than two years after its entry of judgments, to award interest on those judgments, which made no provision for the award of interest, and which had been affirmed by the court of appeals in a mandate which did not provide for interest.

2. Whether the provisions of 31 U.S.C. 724a pertaining to the payment of "judgments (not in excess of $100,000 in any one case)"against the United States, and the payment of interest thereon, govern the judgments awarded individually to the survivors of a decedent who have joined together to bring one action for wrongful death, when the judgments in favor of the individuals are less than $100,000, but the aggregate judgments are more than $100,000.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

These suits were brought against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for deaths arising out of a mid-air collision over Brunswick, Maryland, between

a Viscount passenger airplane and a jet trainer of the Maryland Air National Guard. On December 6, 1961, judgments making no provision for the award of interest were entered in favor of the plaintiffs, and were affirmed by the opinion and judgment of this Court entered on June 13, 1963, neither of which provided for interest (J.A. 11-12). The opinion and judgment of this Court were issued in lieu of mandate on July 9, 1963 (J.A. 3). On April 1, 1964, the plaintiffs filed a motion in the district court "to require the defendant to pay interest on judgment" (J.A. 3, 13-14). On April 20, 1964, the district court entered an order requiring the payment of interest from the date of judgment, December 6, 1961 (J.A. 3, 16-17). These appeals are taken from the April 20, 1964 order (J.A. 3, 17). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

These cases arise out of the mid-air collision over Brunswick, Maryland, on May 20, 1958, between a Viscount passenger airplane owned by Capital Airlines, and a jet trainer airplane owned by the United States and flown by a commissioned officer in the Maryland Air National Guard, who was also a civilian air technician thereof, paid with federal funds pursuant to the so-called "caretaker" statute, 32 U.S.C. 709. The questions of liability and damages were resolved in favor of the plaintiffs by the district court, which entered judgments in their favor on December 6, 1961, which were affirmed by this Court in June,

1963 (J.A. 11-12; 322 F. 2d 1009). The Supreme Court originally denied certiorari (375 U.S. 954), but a request for reconsideration of that denial in light of a subsequent decision by the Court of Appeals for the Third Circuit (State of Maryland for the use of Levin, et al. v. United States, 322 F. 2d 722, petition for certiorari pending as No. 345, O.T., 1964), in cases arising out of the same collision, is now pending in the Supreme Court. Accordingly, the questions of liability and damages are not before this Court, and the only issue before this Court is the propriety of the district court's award, in April, 1964, of interest on the judgments entered in December, 1961. We summarize below the facts concerning the issue of interest.

On May 5, 1959, the survivors and administrator of the estate of the co-pilot of the passenger airplane, Paul Meyer, joined together to bring one suit against the United States under the Federal Tort Claims Act for the damages arising out of his death, and the survivors and the administrator of the estate of the pilot, Kendall Brady, joined together to bring a second such action (J.A. 4-9). Their complaints sought damages and costs, but not interest (J.A. 8-9). Their actions were consolidated for trial, together with a similar action by Capital Airlines for loss of the airplane (J.A. 2). On December 6, 1961, the district court entered one "judgment" in the three actions, prepared by counsel for the plaintiffs, awarding

nine judgments in favor of each individual plaintiff in a stated sum,[1/] and one in favor of Capital Airlines (J.A. 11-12). The judgments made no award of interest (J.A. 11-12). Although the awards in these cases totaled $420,000 of which $249,000 was awarded to the survivors of Brady, and $171,000 to the survivors of Meyer, except for the award of $175,000 to Mrs. Brady, the awards to the eight individual plaintiffs were in amounts under $100,000 each (J.A. 11-12, and see footnote 1, supra).

Appeals were prosecuted by the United States in each of the cases. Plaintiffs did not file transcripts of the judgments with the General Accounting Office, as required by 31 U.S.C. 724a (infra, p. 9) in order to obtain post judgment interest on judgments against the United States in amounts of less than $100,000 (J.A. 15). No appeal was noted by any of the plaintiffs, and the question of interest was not raised at any time in this

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1/ The judgments in the cases at bar awarded the following persons the following sums (J.A. 11-12):

Mary Jane Meyer	$ 85,000
Paul Jeffrey Meyer	25,000
Susan Lynn Meyer	30,000
Pamela Ann Meyer	30,000
Austin Canfield, as ancillary administrator of the estate of Paul Meyer	1,000
Vance Lewman Brady	175,000
Virginia Brady	35,000
Kendall Jesse Brady, Jr.	38,000
Austin Canfield, as ancillary administrator of the estate of Kendall Brady	1,000

Court. The opinion and judgment of this Court entered in June, 1963, affirming the judgments in these cases, [2] made no reference to interest, and made no provision for the award of interest (J.A. 12; 322 F. 2d 1009). Although a petition for a writ of certiorari was subsequently filed, and was denied on December 16, 1963, [3] no stay of the mandate of this Court was sought or issued.

The opinion and judgment of the court of appeals therefore issued on July 9, 1963, as this Court's mandate, and further "judgment" was entered thereon on September 16, 1963 (J.A. 13). Again the issue of interest was not raised, and the order on the mandate of this Court made no reference to interest and no provision for its award (J.A. 13).

Because all of the recoveries, with the exception of that in favor of Mrs. Brady, were in amounts under $100,000, they were referred, subsequent to the denial of certiorari, to the General Accounting Office for payment pursuant from the permanent appropriation, provided by 31 U.S.C. 724a, infra, p. 8 . Checks in the principal amounts of the awards were tendered to

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2/ The judgment in favor of Capital Airlines was reversed on the issue of damages, and remanded to the district court for further proceedings (J.A. 12, 13). An appeal from the judgment subsequently rendered is now pending before this Court as United States v. Capital Airlines, No. 18,448.

3/ A request for reconsideration of the denial of certiorari, in light of State of Maryland f/u/o Levin v. United States, 329 F. 2d 722 (C.A. 3), is now pending in the Supreme Court, as No. 543, O.T., 1963, together with the plaintiffs' petition for certiorari in the Levin case, which is pending as No. 345, O.T., 1964.

plaintiffs, who refused to accept them, and claimed, for the first time in this entire litigation, that they were entitled to interest from the date of the entry of judgment, December 6, 1961.

On April 1, 1964, plaintiffs filed a "motion to re-tax costs and to require defendant to pay interest on judgment" (J.A. 13-14). Plaintiffs later abandoned their motion to re-tax costs (J.A. 16). The Government opposed the motion to require the payment of interest on the ground (1) that it was untimely becaused made long after the entry of judgment, and its affirmance, and (2) that no interest was allowable, because the provisions of 31 U.S.C. 724a, governing the allowance of interest for judgments under $100,000, were applicable and the plaintiffs had not complied with the requirement of that statute that a transcript of the judgment be filed with the General Accounting Office in order to obtain interest during the pendency of an appeal by the Government (see, infra, p. 8). The decision of the Comptroller General so holding, in Hayashi, 40 Comp. Gen. 307, was called to the district court's attention.

The district court (per Holtzoff, J.) granted the plaintiffs' motion. Ignoring the questions of untimeliness and the inconsistency of an award of interest with the mandate of this Court, the court ruled that the nature of the action was governed by State law, and that, under the Maryland Wrongful Death

Act only one action, brought in the name of the State of Maryland, lies for the wrongful death of any one person (J.A. 14-16). Accordingly, the court ruled that "there is a single action" for each decedent within the meaning of 31 U.S.C. 724a (infra, p. 8). and concluded that "while the question is not free from doubt," the judgments "must be deemed to be in excess of $100,000" so that the provisions of 31 U.S.C. 724a were not applicable (J.A. 16). Pursuant to its opinion, the district court entered an order directing the United States to pay interest on the judgments "from the date of the judgments (December 6, 1961) up to, but not exceeding, 30 days after the date of approval of any appropriation Act providing for the payment of judgment" (J.A. 16-17).[4/] From that order these appeals were taken (J.A. 17).

STATUTES INVOLVED

1. Section 2411, Title 28, United States Code, provides in pertinent part:

> (a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.
>
> * * * * *
>
> (b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under

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4/ Interest on the total judgments of $420,000, computed at 4%, pursuant to 28 U.S.C. 2411(b), amounts to $16,800 per year. Under the district court order, interest on the judgments from the date of their entry (December 6, 1961) until the entry of the district court's order requiring the payment of interest (April 20, 1964) amounted to more than $41,000, and accrues at the rate of $1,400 per month.

section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

2. Section 1302 of the Supplemental Appropriations Bill, 1957, 31 U.S.C. 724a, provides:

> There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provide for, as certified by the Comptroller General, of judgments (not in excess of $100,000 in any one case) rendered by the district courts and the Court of Claims against the United States which have become final, together with such interest and costs as may be specified in such judgments or otherwise authorized by law: Provided, That, whenever a judgment of a district court to which the provisions of section 2411 (b) of Title 28 apply is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): Provided further, That whenever a judgment rendered by the Court of Claims is payable from this appropriation, interest payable thereon in accordance with section 2516 (b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office.

STATEMENT OF POINTS

1. The district court erred in awarding interest, in April, 1964, on its judgments of December, 1961, which did not provide for the payment of interest and which had been affirmed by the judgment of the court of appeals without any provision for interest, because the district court was without jurisdiction to vary the mandate of the court of appeals and because plaintiffs were foreclosed from raising the issue of interest after the district court judgments (which they had prepared) had been affirmed by mandate of the court of appeals.

2. The district court erred in ruling that state law governed the issue of whether judgments were "in any one case" within the meaning of 31 U.S.C. 724a, and in ruling that the judgments in these cases were in excess of $100,000 "in any one case" within the meaning of that statute.

3. The district court erred in awarding interest to plaintiffs because plaintiffs were not entitled to interest under the provisions of 31 U.S.C. 724a, which were applicable to the judgments in these cases (with the exception of that in favor of Vance Lewman Brady).

4. The district court erred in entering its order of April 20, 1964, which awarded interest to the plaintiffs on the judgments entered on December 6, 1961.

SUMMARY OF ARGUMENT

I

Because the original judgments of the district court made no provision for interest, and the judgment and mandate of this Court affirming those judgments made no provision for interest, the district court was thereafter without authority to vary the appellate mandate by awarding interest on its judgments. Briggs v. Pennsylvania R. Co., 334 U.S. 304; In re Washington & G. R. Co., 140 U.S. 91; Steiner v. Nelson, 309 F. 2d 19 (C.A. 7).

II

The provisions of 31 U.S.C. 724a were intended to govern the computation of interest and payment of judgments on all "judgments (not in excess of $100,000 each)" against the United States and to provide for speed, uniformity and simplicity therein. H. Rept. 2638, 84th Cong., 2d Sess. The Comptroller General has consistently interpreted that statute as governing in cases where several persons bring suit for one wrongful death and receive individual judgments in amounts less than $100,000 each, but which aggregate more than $100,000. Hayashi, 40 Com. Gen. 307. The Comptroller General's interpretation effectuates the Congressional purposes, is consonant with the language and intent of the statute, and is advantageous both to the government and to the overwhelming majority of judgment holders. Because seven of the eight plaintiffs here received judgments of less than

$100,000 each, and because they concededly failed to comply with the provisions of 31 U.S.C. 724a, the provisions of that statute bar an award of interest on their judgments. The district court committed additional error in rejecting the consistent administrative interpretation of that statute and in holding it inapplicable to the judgments here.

ARGUMENT

Appellees never requested interest in the district court proceedings, and the judgments, prepared and approved by their counsel, did not contain any award of interest. Appellees did not move to amend the judgments to provide for interest in the ten days provided by Rule 59, Fed. R. Civ. P., nor did they raise the issue on appeal to this Court. Instead they waited until more than two years after the entry of the district court judgment, and more than eight months after the judgment of this Court, before raising the issue in this Court. Accordingly, we show first that the judgment of this Court, affirming the judgment of the district court without any award of interest, was therefore binding upon

the district court and upon appellees, and the district court had no authority to deviate from the judgment and mandate of this Court by awarding interest on its prior judgment. Secondly, we show that the district court committed an additional error by aggregating the various awards to the individual plaintiffs to find "judgments in excess of $100,000 in any one case" within the meaning of 31 U.S.C 724a.

I

THE DISTRICT COURT WAS WITHOUT AUTHORITY TO VARY ITS PRIOR JUDGMENT AND THE MANDATE OF THIS COURT BY AWARDING INTEREST

The interests of society in the settlement of disputes, and in the convenience and economy of litigation, require a plaintiff to unite in one proceeding all matters which are part of one cause of action. When a valid and final judgment is entered in a proceeding, therefore, it has long been settled that the plaintiff cannot thereafter maintain an action on the same cause of action. Restatement, Judgments, §§ 47, 62, Comment a. If the judgment is unsatisfactory to the plaintiff in any way, his remedy is, of course, to challenge the judgment on appeal. Restatement, Judgments, § 47, comment b. Similarly, the plaintiff cannot split his cause of action into several parts and litigate them piecemeal. For he is precluded by the prior judgment from maintaining an action upon any part of the cause of action, whether or not the issue was litigated in the original proceeding. Restatement, Judgments, § 68.

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320.

The policy considerations against splitting causes of action are fully applicable to the issue of post judgment interest. In these cases, for example, because plaintiffs asserted a right to such interest for the first time more than two years after the entry of the original judgment, and more than six months after the issuance of this Court's mandate, an additional proceeding in the district court, and an additional appeal to this Court were required. If plaintiffs had made a timely assertion of their claims to such interest, the differences between the parties in that regard could have been resolved in the initial district court proceeding and in the initial appeal. The additional court proceedings disrupt the orderly administration of justice, result in unnecessary expense to the parties, an unnecessary expenditure of the time of counsel and the courts, and an unnecessary delay in the conclusion of the litigation.

It is not surprising,therefore, that since the days of Chief Justice Marshall, the Supreme Court has consistently held that the question of interest is one for the appellate courts on the original appeal from the trial court judgment, and that where there is a favorable appellate ruling for the plaintiff in a suit, but the mandate of the appellate court does not direct an award of interest, the district court is without authority to deviate from the mandate by adding an allowance

for interest. E.g., Briggs v. Pennsylvania R. Co., 334 U.S. 304; In re Washington & G. R. Co., 140 U.S. 91; Himley v. Rose, 5 Cranch 313.

In the Washington & G. R. Co., case, supra, for example, the plaintiff was awarded a judgment by the special term of the Supreme Court for the District of Columbia, for personal injuries arising out of the defendant's negligence. The judgment, which made no provision for the award of interest, was affirmed by the general term of that court, without provision for interest, and, on appeal, by the Supreme Court, again without provision for interest. When the mandate of the Supreme Court issued to the lower court, however, that court granted the plaintiff's motion for judgment from the date of the original judgment. 140 U.S. at 92-93.

The Supreme Court granted the defendant's petition for a writ of mandamus, holding that the lower court had no authority to deviate from the appellate mandate. The Court refused to consider "whether interest was allowable by law, or rule, or statute," on the original judgment. 140 U.S. at 97. Instead it ruled (140 U.S. at 94-95):

> Upon the hearing on the writ of error, which resulted in the judgment and mandate of this court, the question of the allowance of interest on the judgment from its date until it should be paid was a question for the consideration of this court. The fact that the judgment of this court merely affirmed the judgment of the general term with costs, and said nothing about interest, is to be taken as a declaration of this court that, upon the record as presented to it, no interest was to

be allowed. It was thereupon the duty of the general term to enter a judgment strictly in accordance with the judgment of this court, and not to add to it the allowance of interest.

> The judgment of the general term of June 28, 1886, made no allowance of interest, nor did the judgment of the special term of December 18, 1885. Those were the judgments which were affirmed by this court, and it affirmed them as not providing for any interest.* * * Under these circumstances, the general term had no authority to make its order of June 9, 1890, in regard to interest on the judgment. * * *

Similarly, in Briggs v. Pennsylvania R. Co., 334 U.S. 304, a jury had rendered a verdict for the plaintiff in an action brought under the Federal Employees Liability Act. The district court entered a judgment for the defendant notwithstanding the verdict, and the court of appeals reversed, directing entry of judgment for the plaintiff, but without any mention of interest. The district court entered judgment on the mandate, but added interest at the rate of 6%,pursuant to 28 U.S.C. 811 (now 28 U.S.C. 1961), which provided that interest "shall be allowed on any money judgment in a civil case recovered in a district court." The Supreme Court ruled that the district court was without power or authority to deviate from the mandate of the appellate court and that its allowance of interest was therefore erroneous. 334 U.S./306-307. The Court stated:

> In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. Himely v. Rose, 5 Cranch 313; The Santa Maria, 10 Wheat. 431; Boyce's Executors v.

> Grundy, 9 Pet. 275; Ex Parte Sibbald v. United States 12 Pet. 488. The rule of these cases has been uniformly followed in later days; see, for example, In re Washington & Georgetown R. Co., 140 U.S. 91; Ex Parte Union Steamboat Company, 178 U.S. 317; Kansas City Southern R. Co. v. Guardian Trust Co., 281 U.S. 1. Chief Justice Marshall applied the rule to interdict allowance of interest not provided for in the mandate, Himely v. Rose, 5 Cranch 313; Mr. Justice Story explained and affirmed the doctrine, The Santa Maria, 10 Wheat. 431; Boyce's Executors v. Grundy, 9 Pet. 275. We do not see how it can be questioned at this time. * * *

As the Seventh Circuit has recognized, Steiner v. Nelson, 309 F. 2d 19, 21-22 (C.A. 7), the Supreme Court in Briggs rejected the contention urged in the dissenting opinion, that the silence of the appellate mandate in regard to interest should be construed as authorizing interest because the applicable statute allowed interest as a matter of right.[5/] The Court ruled (334 U.S. at 306-307):

> * * * The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendments of the mandate. But no move to do this was made during the term at which it went down. While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, Hazel-Atlas Glass Co. v. Hartford Co., 322 U.S. 238, it

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5/ 334 U.S. at 308-313 (dissenting opinion). The dissenting opinion followed the rationale of the decision in Blair v. Durham, 139 F. 2d 260 (C.A. 6). In rejecting the arguments of the dissenting opinion, therefore, the Court necessarily rejected the basis for the decision in Blair v. Durham, supra. Steiner v. Nelson, 309 F. 2d 19, 21-22 (C.A. 7).

> has not been held to survive for the convenience of litigants. Fairmont Creamery Co. v. Minnesota, 275 U.S. 70.
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> * * * * *
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> Hence the question whether interest might, on proper application, have been allowed, is not reached. / In re Washington & Georgetown R. Co., 140 U.S. 91. / [Footnotes omitted].

Subsequent to the Supreme Court's ruling in Briggs, supra, the courts of appeals have repeatedly ruled that the question of interest should be presented to courts of appeals when the case is pending there, or upon prompt application for modification of the mandate. E.g., Givens v. Missouri-Kansas-Texas R. Co., 196 F. 2d 905 (C.A. 5); United States v. Hougham, 301 F. 2d 133, 144-145 (C.A. 9). Following the decision in Briggs, the appellate courts have held that, where no such demand is made to the appellate court and the mandate of the appellate court makes no provision for interest, the district court has no authority to deviate from the mandate by awarding interest on the judgment. E.g., Steiner v. Nelson, 309 F. 2d 19 (C.A. 7); Lee v. Terminal Transport Co., 301 F. 2d 234 (C.A. 7); Chemical Bank & Trust Co. v. Prudence Bonds Corp., 213 F. 2d 443 (C.A. 2), certiorari denied, 348 U.S. 856. Accord: Bankers Life & Casualty Co. v. Bellanca Corporation, 308 U.S. 757 (C.A. 7).

The recent decision in Steiner v. Nelson, 309 F. 2d 19 (C.A. 7) is directly in point. In that case, as here, the

complaint contained no request for interest, and the district court judgments made no award of interest, and the court of appeals' judgment of affirmance made no provision for the award of interest. 309 F. 2d at 20. Similarly, in that case, as here, plaintiffs asserted that they were entitled to interest as a matter of right, under the provisions of 28 U.S.C. 2411. The Seventh Circuit held that the plaintiffs were not entitled to interest, and that its mandate of affirmance left the district court without authority to award interest on its earlier judgment. The court ruled (309 F. 2d at 21-22):

> * * * the District Court * * * was, in the face of our order of affirmance and mandate, without authority to direct payment of interest. The mandate did not provide for interest and the District Court was without authority to modify it or deviate from its provisions [citing cases]. Plaintiffs' argument that no deviation from the District Court judgment, the order of affirmance, or the mandate would be involved because the interest, if required by the statute, would be regarded as a part of the judgment affirmed -- attaching by operation of law as a legal incident of the statute -- is based on Blair v. Durham, 6 Cir., 139 F. 2d 260. The argument is not without persuasion but it was impliedly rejected by the majority in Briggs where the Blair doctrine was discussed and relied upon in the dissenting opinion (334 U.S. 307-314, 68 S. Ct. 1089).

These cases, we submit, are governed by the authorities cited above. Here, as in those cases, the successful plaintiffs made no demand for interest while the case was pending before the appellate court, and, after the mandate issued without provision for interest, made no timely application to the appellate court for modification of the mandate. Here, as in those cases,

in the absence of any provision for interest in the mandate and judgment of the appellate court, the district court was without authority to deviate from that mandate by awarding interest on its prior judgment. Briggs v. Pennsylvania R. Co., 334 U.S. 304; In re Washington & G. R. Co., 140 U.S. 91; Steiner v. Nelson, 309 F. 2d 19 (C.A. 7).

II

THE PROVISIONS OF 31 U.S.C. 724a PROHIBIT THE PAYMENT OF POST-JUDGMENT INTEREST IN THESE CASES

In our view the district court's lack of authority to vary its original judgments and the mandate of this Court, by awarding interest from the date of its original judgment, is dispositive of this appeal. In addition to its assumption of the authority to vary the mandate of this Court, however, the district court also misinterpreted the provisions of 31 U.S.C. 724a concerning the payment of judgments against the United States. For the sake of completeness, therefore, we show here that the statute governs the payment of eight out of the nine judgments in these cases to seven of the eight plaintiffs, and therefore precluded the award of post-judgment interest on them, even apart from the absence of any provision for interest in the original judgments of the district court and the mandate of this Court.

If the provisions of 31 U.S.C. 724a, supra, p. 8, apply to the judgments in these cases, plaintiffs are concededly not entitled to interest. For that statute authorizes the award of interest on a judgment against the United States "only from the date of the filing of the transcript

thereof in the General Accounting Office to the date of the mandate of affirmance." 31 U.S.C. 724a, supra, p. 8. The transcript of judgments in these cases were concededly not filed with the General Accounting Office until long after this Court's mandate of affirmance (J.A. 15). Accordingly, interest on those judgments could not properly be allowed under 31 U.S.C. 724a, even apart from the district court's lack of authority to vary the mandate of this Court. United States v. Jacobs, 308 F. 2d 906 (C.A. 5); United States v. Mississippi Valley Barge Line, 285 F. 2d 381, 386 (C.A. 6).

The provisions of 31 U.S.C. 724a govern the payment of "judgments (not in excess of $100,000 in any one case)" against the United States. 31 U.S.C. 724a, supra, p. 8. If the judgments in these cases are "not in excess of $100,000 in any one case," therefore, plaintiffs are not entitled to post-judgment interest. Only one of the judgments here, that to Mrs. Brady, was in an amount in excess of $100,000, but the aggregate awards for each of the two decedents was well above $100,000 (J.A. 11-12). The district court believed that the Maryland wrongful death statute governed the question of whether the judgments were "in excess of $100,000 in any one case" within the meaning of 31 U.S.C. 724a (J.A. 14, 15), and that, because

there was only one cause of action under Maryland law for each wrongful death, regardless of the number of plaintiffs, the judgments exceeded $100,000 (J.A. 15-16). After a brief discussion of the background and history of 31 U.S.C. 724a, we show here that Federal law, rather than State law, governs the question of whether the judgments here are "judgments (not in excess of $100,000 in any one case)" within the meaning of 31 U.S.C. 724a, and that the intent of Congress and the consistent administrative interpretation of that statute call for a holding that, except for the judgment to Mrs. Brady, they were governed by that statute.

A. Statutory Background and Legislative History of 31 U.S.C. 724a.

It has long been settled that courts have no authority to award interest on a judgment or claim against the United States, unless there is express consent for such an award by statute or in a contract. United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 and authorities cited; United States v. Goltra, 312 U.S. 203, 207.

Statutory authority for the award of interest on judgments against the United States is found in 28 U.S.C. 2411. Except for judgments on claims for tax refunds that statute provides for interest at 4% from the date of judgment until not more than thirty days after the approval of an appropriation providing for the payment of the judgment. 28 U.S.C.

2411(b), supra, pp. 7-8. This section contemplates payment of the judgment from a specific, subsequently enacted, appropriation act, and provides for interest on the judgment while the requests for appropriations are being processed by the executive and legislative branches of the Government.

In three respects, this method of paying judgments was found to be unsatisfactory: (1) it imposed a burden of handling requests for such appropriations upon Congress and upon three branches of the executive; (2) the necessity for special appropriations resulted in a substantial period of delay in paying the judgments after final judicial action, to the hardship and frustration of successful litigants; and (3) the delay resulted in substantial additional interest costs to the Government. Hearings before the House Committee on Appropriations, The Supplemental Appropriation Bill, 1957, Part 2, 84th Cong., 2d Sess., pp. 883-884, 888-889. The period of delay between appellate mandate of affirmance and the enactment of appropriation act averaged six months. Id., at p. 884.

In 1953 the General Accounting Office proposed the enactment of a permanent appropriation for the payment of judgments to overcome those difficulties. The proposal gained acceptance, but objections were raised to some details. Hearings, supra, pp. 884, 888. The proposal was reworked to conform to the practice of paying Court of

Claims' judgments, and submitted to Congress again in 1956, in substantially the same language as is now found in 31 U.S.C. 724a. Hearings, supra, pp. 883-885.

As do the present provisions of 31 U.S.C. 724a, the proposed legislation established a permanent appropriation for the payment of judgments of the district courts and Court of Claims against the United States, not exceeding $100,000, upon the certification of those judgments by the Comptroller General; but provided that interest would be paid on district court judgments on which 28 U.S.C. 2411(b), supra, pp. 7-8, would apply, only from the filing of the transcript of judgment with the General Accounting Office until the entry of the mandate of affirmance. Hearings, supra, pp. 884-885. This provision conformed with that previously in effect in regard to Court of Claims' judgments. Hearings, supra, pp. 883-884. The proponents of the bill (the Bureau of the Budget, the General Accounting Office and the Department of Justice) called Congressional attention to the fact that the bill would eliminate payment of interest on judgments both between the entry of judgment and the filing of a transcript with the General Accounting Office, and after the mandate of affirmance, but justified the proposal on the ground that the bill was advantageous to judgment holders

because it reduced the delay in payment of judgments, and eliminated entirely the substantial period of delay between final judicial action and the passage of the special appropriation. Hearings, supra, p. 883.

The House Committee on Appropriations recommended enactment of the proposed legislation, which it described as "establishing a permanent indefinite appropriation for the payment of judgments (not in excess of $100,000 each)." H. Rept. 2638, 84th Cong., 2d Sess., p. 72. The Committee estimated that the proposal would apply to approximately 98% of the judgments against the United States, and recommended passage because (Ibid.):

> This recommendation will permit a simplification of the payment procedure, will provide uniformity in interest computation, and will serve to reduce the total amount of interest paid by the government.

The committee recommendation was accepted, and the proposal became Sec. 1302 of the Supplemental Appropriations Bill of 1957, 70 Stat. 678, 694, 31 U.S.C. 724a, supra, p. 9.

B. The Provisions of 31 U.S.C. 724a Govern the Payment of Judgments Not Exceeding $100,000 Each, Whether or Not They Arise Out of One Death.

1. The Congressional purposes in adopting 31 U.S.C. 724a, to provide for simplicity in the payment procedure

and uniformity in the computation of interest, and "to reduce the total amount of interest paid by the government" are thus clearly manifested by the legislative history of the statute. H. Rept. 2638, 84th Cong., 2d Sess., p. 72. And while the language of 31 U.S.C. 724a, "judgments (not in excess of $100,000 in any one case)" is ambiguous, the Congressional intent to have the provisions of 31 U.S.C. 724a apply to 98% of all judgments, and particularly to all "judgments (not in excess of $100,000 each)" (emphasis added) is clear from that history. Ibid. Since seven of the eight individual plaintiffs here received eight judgments not in excess of $100,000 each, the legislative intent can be effectuated 6/ only by applying the provisions of 31 U.S.C. 724ato those eight judgments.

2. The administrative interpretation of the statute by the agency charged with its administration leads to the same conclusion. In 1960 the question presented by this case, whether individual judgments arising from one death, each for an amount less than $100,000, but which aggregated more than $100,000, were payable under the

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6/ The proper function of the courts in interpreting statutes is of course "to construe the language so as to give effect to the intent of Congress." United States v. American Trucking Association, 310 U.S. 534, 542.

provisions of 31 U.S.C. 724a, was decided by the Comptroller General in the affirmative. Hayashi, 40 Comp. Gen. 307.

In that case, six judgments were awarded under the Federal Tort Claims Act to the six members of one family, for the wrongful death of one spouse and parent. Five of those judgments were in amounts less than $100,000 each, but, as in these cases, the aggregate of all was in excess of $100,000. 40 Comp. Gen. 307-308. There, as in these cases, an appeal by the United States had resulted in an affirmance by the court of appeals. 40 Comp. Gen. 308. The Comptroller General determined, apparently at the request of the successful plaintiffs in that case, that the individual judgments in favor of the five children there were "judgments (not in excess of $100,000 in any one case)" within the meaning of 31 U.S.C. 724a, and were therefore payable from that permanent appropriation.

The Comptroller General noted that, while the legislative history did not suggest that Congress had specifically considered the problem, it did demonstrate that "the primary purpose in establishing the appropriation was to provide for the prompt payment of judgments and to thereby eliminate or greatly reduce the costs of interest thereon." 40 Comp. Gen. at 308. In rejecting the notion that the phrase "in any one case" should be read

as meaning in any one docket number, or in any docket number involving a single death, he ruled (40 Comp. Gen. at 308-309):

> It seems pertinent to note, however, that Rule 20 of the Rules of Civil Procedure for the United States District Courts, set forth in the appendix to 28 U.S.C., provides that all persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction or occurrences and judgment may be given for one or more plaintiffs according to their respective rights for relief. The rules also provide for mandatory joinder of parties in certain cases.
>
> In the instant case it appears that each plaintiff has a cause of action against the United States and could have sued individually. Any final judgment thus received, if less than $100,000, clearly would have been payable from the permanent appropriation. The joining of all of the parties in one suit is merely for the convenience of the Court and the parties. In view of the foregoing and in consonance with the purpose for which the permanent fund was established we believe the limitation on payments from the fund refers generally to a judgment in excess of $100,000 awarded either to a single plaintiff or to two or more plaintiffs jointly.
>
> * * * * * *
>
> Also, you are advised that future similar judgments not exceeding $100,000 each, even though involved in a single court case where the total amount of the individual judgments exceeds $100,000 may be certified by us for payment from the permanent fund pursuant to the authority of section 1302, supra.

The General Accounting Office has consistently followed this interpretation of 31 U.S.C. 724a, and did so in the present cases. See, 40 Comp. Gen. at 309. Such an administrative interpretation of a statute, made when it was new,

by the agency charged with its administration, should not be overturned except for the most compelling reasons. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315; Federal Housing Authority v. Darlington, 358 U.S. 84, 90; Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 409. No such compelling reason exists here. On the contrary, adoption of the administrative interpretation is consistent with the Congressional intent and purpose in adopting the statute. See pp. , supra.

We note that the Comptroller General's interpretation of 31 U.S.C. 724a is generally more favorable to plaintiffs than the interpretation advocated by the plaintiffs here, and adopted by the district court. For it is obviously advantageous to the overwhelming majority of plaintiffs, in circumstances such as those at bar, to have their judgments governed by the provisions of 31 U.S.C. 724a so that they would be paid promptly after final court action, rather than to suffer the substantial delay (averaging several months) required for the enactment of a special appropriation, although receiving 4% simple interest during the period of delay, pursuant to 28 U.S.C. 2411. The advantage has been particularly striking in the last few years, when savings institutions have been paying more than 4% compound interest on Government

insured savings. Only in those few cases where the government prosecutes an appeal could the provisions of 31 U.S.C. 724a be disadvantageous to plaintiffs, and then only if the plaintiffs neglected to file the transcript of judgments with the General Accounting Office pursuant to 31 U.S.C. 724a. The plaintiffs' neglect to do so in these cases should not lead to a narrow construction of a statue which is beneficial both to the Government 7/ and to the private persons involved in the overwhelming majority of cases.

3. The district court refused to follow the administrative interpretation of the statute because it believed that the question of whether the judgments here were "judgments (not in excess of $100,000 in any one case)" within the meaning of 31 U.S.C. 724a was to be determined in accordance with the law of Maryland (J.A. 14, 15), that under that law there could be only one cause of action for each wrongful death, regardless of the number of individual plaintiffs (J.A. 15-16), and concluded that there was only "one action" for each death and only one case within the meaning of 31 U.S.C. 724a (J.A. 16).

The district court apparently reached its conclusion that state law was controlling on the ground that these

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7/ The Government benefits from a broad application of 31 U.S.C. 724a by virtue of reduced interest costs. See, supra, pp. 24-26.

proceedings were brought under the Federal Tort Claims Act, that 28 U.S.C. 2411(b) is merely a provision of that Act, and that 31 U.S.C. 724a was not permanent legislation, but a provision of a specific appropriation act which has been reenacted each year (J.A. 14-15). Two of the three bases for the court's ruling are factually erroneous. As we have noted (supra, pp. 24-25) 31 U.S.C. 724a was permanent legislation, in the form of a permanent, indefinite appropriation. And both 28 U.S.C. 2411(b) and 31 U.S.C. 724a apply to judgments rendered under the Tucker Act, where Federal law is controlling, rather than merely to Federal Tort Claims Act judgments.[8/] There is no basis, therefore, for inferring that Congress intended to refer to state law for determination of whether judgments were "judgments (not in excess of $100,000 in any one case)" within the meaning of 31 U.S.C. 724a. On the contrary, 28 U.S.C. 2411(b) and 31 U.S.C. 724a provide uniform Federal rules for the payment of post-judgment interest, regardless of inconsistent

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8/ 28 U.S.C. 2411(b) applies in terms to "all final judgments rendered against the United States in actions instituted under section 1346 of this title" except judgments for overpayment of taxes. 28 U.S.C. 1346, of course, encompasses claims against the United States based upon contractual or statutory claims not sounding in tort. 28 U.S.C. 1346(a)(2). Similarly, 31 U.S.C. 724a applies in terms to all "judgments (not in excess of $100,000 in any one case) rendered by the district courts and the Court of Claims against the United States which have become final."

provisions of state law.[9/] For obviously, state rules concerning the dates for the computation of interest, or the rate of interest, could not stand in face of the express provisions of those acts regulating the period of time for which interest is to be paid, and the rate thereof.

The purposes of 31 U.S.C. 724a would to a large extent be frustrated, if the provisions of that statute were to be construed by reference to state law. For, as we have shown above (supra,pp.24-26) that statute was adopted to simplify payment procedures, to permit speedy payment of judgments and to provide for uniformity in the computation of interest. H. Rept. 2638, 84th Cong., 2d Sess., p. 72. Each of these purposes would be partially frustrated if the General Accounting Office were required to examine the varying laws of each of the fifty states to determine whether judgments were within or without the provisions of 31 U.S.C. 724a. The goals of speed, uniformity and simplicity can be served only if there is a uniform federal rule.

9/ The Federal Tort Claims Act also expressly excepts from reference to state law matters of pre-judgment interest, by stating that the United States "shall not be liable for interest prior to judgment." 28 U.S.C. 2674.

At any rate, the question of whether actions may be brought individually or together is a procedural matter,[10/] governed by the Federal Rules of Civil Procedure. Regardless of state law, therefore, the Federal Rules provide that only parties having a "joint interest" be made parties, and then only if they are subject to the court's jurisdiction. Rule 19(a), Federal Rules of Civil Procedure. They also specifically provide that if a party having a joint interest is absent, the court may proceed, and the judgment "does not affect the rights and liabilities of absent parties." Rule 19(b), Federal Rules of Civil Procedure. Since the individual plaintiffs here had individual, rather than joint,rights arising out of each death, each of them undoubtedly could have brought an individual action under the Federal Tort Claims Act for his financial loss. If separate actions had been brought and had resulted in the judgments here for less than $100,000 each, they would clearly have been governed by 31 U.S.C. 724a. The fact that Rule 20, Federal Rules of Civil Procedure, permits the joinder in one docket

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10/ The Maryland courts also appear to consider the question procedural only. In State, use of Bashe v. Boyce, 72 Md. 140,143-144, the Court of Appeals of Maryland explained the object of the provision in the wrongful death act requiring the institution of one action, rather than several, for each death, as "to protect a defendant from being vexed by several suits by or in behalf of different equitable plaintiffs for the same injury, when all the parties could, with perfect convenience, be joined in one proceeding.

number of individual claims by several persons, arising out of the same transaction, should not lead to a different result, for if it did the substantive rights of the parties would depend upon the form of the pleadings. As the Comptroller General noted, the joinder of several parties in one action for the convenience of the parties and the courts should not lead to different substantive results. Hayaski, 40 Comp. Gen. 307, 308-309; see supra, pp. 27-28.

The district court also relied upon the provisions of the Maryland Wrongful Death Act providing that the action should be brought in the name of the State of Maryland (J.A. 15, 16). Md. Anno. Code, Art. 67, § 4. But that provision, which was repealed in 1962 (Md. Anno. Code (1964 Supp.) Art. 67, § 4), can have no effect in a Federal court suit, for the Federal rules require that suits be brought in the name of the real party in interest, except when Federal statutes provide for bringing an action in the name of the United States, for the use or benefit of another. Rule 17(a), Federal Rules of Civil Procedure.[11/] The fact that plaintiffs here did not comply with that rule does not, of course, increase their rights.

11/ Similarly, the rules provide that "judgment may be given for one or more of the plaintiffs according to their respective rights for relief." Rule 20(a) Federal Rules of Civil Procedure. The district court's assertion that there was but "a single judgment" for each wrongful death (JA. 16) is inconsistent with the provisions of Rules 17 and 20. Federal Rules of Civil Procedure and is also incompatible with the awards it made to each of the plaintiffs individually (J.A. 11-12).

CONCLUSION

For the foregoing reasons, the order and judgment of the district court should be reversed.

Respectfully submitted,

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AUGUST, 1964.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,676

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF MARYLAND for the use of
MARY JANE MEYER, ET AL.,

Appellees.

No. 18,677

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF MARYLAND for the use of
VANCE LEWMAN BRADY, ET AL.,

Appellees.

On Appeals from the United States District Court for The District of Columbia

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QUESTIONS PRESENTED

In the opinion of Appellees, the questions presented are:

1. Is post-judgment interest to be computed on the judgment from the date of entry of the final judgment in the district court in favor of the plaintiffs in the Meyer and Brady cases on December 6, 1961 (which was affirmed by this Court), until not exceeding thirty days after the date of approval of any appropriation Act providing for payment of the judgment, as an incident of said judgment by virtue of the provisions of 28 U.S.C. §2411(b), despite the absence of any reference in said judgment or in the opinion and judgment or mandate of this Court to the subject of post-judgment "interest"?

2. Are the provisions of 31 U.S.C. §724(a) which modify 28 U.S.C. §2411(b) and apply only where the "judgments" do not exceed $100,000 "in any one case," applicable to a judgment awarding a sum of $170,000 to the surviving dependent next of kin of Paul Frank Meyer, deceased, and a sum of $248,000 to the surviving dependent next of kin of Kendall Jesse Brady, deceased?

3. If interest is to be computed on said final judgment, as provided by 28 U.S.C. §2411(b), was it proper for the district court, following affirmance by this Court of the part of said judgment which applied to the Meyer and Brady cases, and denial of the Petition to the United States Supreme Court for the issuance of the Writ of Certiorari, and after the Government tendered checks in payment of the amounts awarded to each of the surviving next of kin (except Mrs. Brady, widow of Kendall Jesse Brady) but refused to pay interest thereon as provided in 28 U.S.C. §2411(b), to enter

its order on April 20, 1964 directing the defendant to pay interest on said judgment entered December 6, 1961, in the Meyer and Brady cases, with interest to be computed thereon at 4% per annum from the date of said judgment up to but not exceeding thirty days after the approval of any appropriation act providing for the payment of the judgment "in these two cases?" (J.A. 17)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,676

UNITED STATES OF AMERICA,

Appellant,

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BRIEF FOR APPELLEES

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

STATUTES AND RULES

*Cases chiefly relied upon are marked by asterisks.

COUNTERSTATEMENT OF THE CASE

These two consolidated cases, Civ. Act. 1236-59, Paul Frank Meyer deceased, and Civ. Act. 1237-59, Kendall Jesse Brady, deceased, were tried by consent of the parties in the district court together with *Capital Airlines, Inc. v. United States of America*, Civ. Act. 1238-59. A judgment was rendered on December 6, 1961, for the plaintiffs in all cases. On appeal, this Court, on June 13, 1963, affirmed "the portion of the judgment" in the Meyer and Brady cases, and reversed and remanded the portion of the judgment in favor of Capital Airlines for further proceedings on the issue of damages (J.A. 12). *United States v. State of Maryland*, 322 F.2d 1009 (Ct. of App. D.C. 1963). A certified copy of this judgment issued on July 9, 1963 (J.A. 3). On September 16, 1963, the district court, after reciting that the United States Court of Appeals had affirmed the "judgment" in the Meyer case, No. 16953, and the "judgment" in the Brady case, No. 16954, and had affirmed the "judgment" in the Capital Airlines case, No. 16955, on the issue of liability, but remanded the Capital Airlines case for new findings on the issue of damages, entered "judgment" in the foregoing cases, "pursuant to the opinion and mandate of this court" (J.A. 13). On December 16, 1963, the United States Supreme Court denied the Petition for a Writ of Certiorari, 375 U.S. 954. No petition for rehearing was filed.

Thereafter, before the Appellees moved in April 1964 for an order requiring the Appellant to pay interest on the judgment in the Meyer and Brady cases (J.A. 13, 14), the Government tendered to the Appellees' counsel checks in payment of the separate amounts apportioned to each of the surviving next of kin in the judgment in the Meyer case, and in the judgment in the Brady case (except for the $175,000 apportioned to Mrs. Brady, the widow of Brady, deceased), (J.A. 2). Said checks did not include post-judgment interest.

The Government declined to pay post-judgment interest on the judgment in the Meyer and Brady cases as requested by Appellees and required by 28 U.S.C. §2411(b), claiming that each check was in payment of a separate judgment, that each judgment was for less than $100,000, that plaintiffs were therefore not entitled to post-judgment interest on each judgment which was less than $100,000, because Appellees had not complied with 31 U.S.C. §724(a), and filed a transcript of said judgments in the General Accounting Office (J.A. 15), (the same contention the Government makes on this appeal (Brief for Appellant, 4, 20-35)). When Appellees indicated their intention to litigate the question Appellant withdrew its tender.

Prior to the resolution of this controversy in the lower Court the third circuit rendered its opinion in *State of Maryland for the Use of Levin v. United States*, Nos. 14041, 14042, on April 1, 1964, rehearing denied April 28, 1964, holding for the Government on the issue of agency in an action brought to recover damages for the deaths of certain passengers in the Capital Airlines Viscount, who were killed in the same disaster which took the lives of Meyer and Brady.

Appellees moved for an order in the lower Court directing the payment of post-judgment interest on said final judgment. After a hearing on the matter, the district court on April 20, 1964, rendered its opinion (J.A. 14, 15, 16) and entered an order that post-judgment interest be computed on said judgment under the provisions of 28 U.S.C. §2411(b) (J.A. 16, 17). Appellees then requested Appellant to pay the judgment with appropriate interest, or the amount of the judgment without interest in the event Appellant planned to appeal, but Appellant refused. On June 2, 1964, the Government filed its Notice of Appeal from the said "judgment" entered on April 20, 1964.

The Government took no further action with respect to the final judgment entered in the Meyer and Brady cases by this Court on June 13, 1963, until June 10, 1964, when it filed in the United States Su-

preme Court a "Motion for Leave to File Conditional Petition for Rehearing," and its "Conditional Petition for Rehearing," Case No. 543, stating that if "a writ of certiorari is granted in the Levin case, a writ should also be granted in the Meyer, Brady and Capital Airlines cases. This Motion and Conditional Petition have not been acted upon by the Supreme Court.

A single action was brought in the district court for the recovery of damages for "the benefit" of all surviving dependent next of kin of Paul Frank Meyer, the decedent, "in the name of the State of Maryland," as plaintiff, Civ. Act. 1236-59, pursuant to and as required by the provisions of the Wrongful Death Act of the State of Maryland, Anno. Code of Md., Art. 67, Sec. 4. A single action was likewise brought in the district court in the Brady case, Civ. Act. 1237-59. These two cases and that of Capital Airlines, Civ. Act. 1238-59, were consolidated for trial by agreement of the parties (J.A. 2). After a separate trial of the agency issue, and then a subsequent trial of the liability and damage issue, a "Judgment" was entered for the plaintiffs (J.A. 2). One "judgment" was entered (J.A. 11). The court, sitting as the trier of the facts in these Federal Tort Claims Act cases, determined the damages and divided "the amount so recovered" among the surviving widow and children of each decedent, as required under Sec. 4 of Art. 67, of the Maryland Wrongful Death Act. Seven separate "judgments" were not entered in favor of the widows and children of the decedents as the footnote of the Brief for Appellant, 4, appears to indicate. The judgment order of the district court entered December 6, 1961, appears at J.A. 2, 11, 12. The judgment of this Court entered June 13, 1963, appears at J.A. 12.

STATUTES INVOLVED

1. Anno. Code of Md., Art. 67, Sec. 1

§1. Liability notwithstanding death.

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the vessel or person who would have been liable if death had not ensued, or the executor or administrator of the said person who would have been liable in case of the death of the said person who would have been liable, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony and if death ensues as a result of wrongful act, neglect or default of a vessel, suit may be brought in rem against said vessel in any court of competent jurisdiction; provided, however, that any such action against the executor or administrator of the said person who would have been liable shall be commenced within six calendar months after the date of the qualification of the executor or administrator of the said person who would have been liable. (An. Code, 1951, §1; 1939, §1; 1924, §1; 1912, §1; 1904, §1; 1888, §1; 1852, ch. 299, §1; 1929, ch. 570, §1, p. 1377; 1949, chs. 468, 742.)"

2. Anno. Code of Md., Art. 67, Sec. 4

§4. Action for Wrongful death.

"Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused or if there be no such person or persons entitled, then any person related to the deceased by blood or marriage, who, as a matter of fact, was wholly dependent upon the person whose death shall have been so caused. Every such action shall be brought by and in the name of the State of Maryland for the use of the person or

persons entitled to damages; "parent" shall include the mother of an illegitimate child whose death shall have been so caused; "child" shall include an illegitimate child whenever the person whose death is so caused is the mother of such child; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury by their verdict shall find and direct; provided, that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within eighteen months after the death of the deceased person. (An. Code, 1951, §4, 1939 §3; 1924, §2; 1912, §2; 1904, §2; 1888, §2; 1852, ch. 299, §2; 1937, ch. 38; 1950, ch. 89; 1952, ch. 16)."

3. Section 2411, Title 28, United States Code, provides, in part:

> (a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any over-payment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.
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> *****
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> (b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under

section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment."

4. Section 1302 of the Supplemental Appropriations Bill, 1957, 31 U.S.C. 724(a), provides:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of judgments (not in excess of $100,000 in any one case) rendered by the district courts and the Court of Claims against the United States which have become final, together with such interest and costs as may be specified in such judgments or otherwise authorized by law; Provided, That, whenever a judgment of a district court to which the provisions of section 2411(b) of Title 28 apply is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): Provided further, That whenever a judgment rendered by the Court of Claims is payable from this appropriation, interest payable thereon in accordance with section 2516(b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office."

SUMMARY OF ARGUMENT

1. Post-judgment interest is to be computed on the original judgment entered in the district court in the Meyer and Brady cases and affirmed by this Court, as an incident to the judgment by reason of the statute, 28 U.S.C. §2411(b), from the date of the entry of said judgment on December 6, 1961.

2. Such interest is to be computed by the clerk despite the absence of any reference to the subject of post-judgment interest either in the judgment of the district court or in the judgment and mandate of this Court. While reference to interest in said judgments would not be error, such reference is unnecessary and improper.

3. The cases on which the Government relies to support its contention that post-judgment interest is not recoverable if not referred to and provided for in the mandate involve cases where pre-judgment interest is sought, or where interest is recoverable only where the court grants the recovery of interest as a matter of discretion.

4. When the Government tendered checks in payment of the portions of the judgment representing the division awarded to Mrs. Meyer, the widow, and to the minor children of Paul Frank Meyer, deceased, and to the minor children of Kendall Jesse Brady, deceased, without interest thereon as required by law, and refused to pay interest on the judgment, it was proper for the district court to order that interest be computed on the judgment in accordance with 28 U.S.C. §2411(b).

5. The provisions of 31 U.S.C. §724(a) apply only if the judgments "in any one case" do not exceed $100,000 and said statute therefore has no application to the single judgment rendered in the Brady and Meyer cases which included an award of $170,000 for damages caused by the death of Paul Frank Meyer, and $248,000 caused by the death of Kendall Jesse Brady, deceased.

6. State law governs under the Federal Tort Claims Act (28 U.S.C. 1346 (b)) as to the capacity of the parties to sue, and as to who was the proper plaintiff to bring the wrongful death action.

7. Under the Maryland Wrongful Death Act, only one action could be brought against the United States for the widow and the children of each decedent, and it had to be brought in the name of the State of Maryland as the plaintiff for the benefit of the widow and children. Only one recovery could be had, and it was "no concern" of the defendant whether the court apportioned the award between the widow and children, or how the award was apportioned. The amount awarded to the widow and each child did not constitute a separate judgment for each.

8. Appellees contend that the judgment of the district court, and the mandate of the Court of Appeals properly omitted any reference to post-judgment interest. But in the event this Court concludes that such interest is recoverable only if the court specifically provides for it in the judgment order or mandate, then appellees ask the Court to exercise its discretionary power to amend its mandate to provide nunc pro tunc that interest shall be computed on the said judgment, with respect to the portion of it awarded in the Paul Frank Meyer and in the Kendall Jesse Brady cases, at the rate of 4% per annum from the date of entry of judgment in the district court on December 6, 1961, up to but not exceeding thirty days after the date of approval of any appropriation Act providing for the payment of the judgment.

ARGUMENT

I

Post-Judgment interest is to be computed on the judgment entered in the district court in the Meyer and Brady cases on December 6, 1961, and affirmed by this court, as an

> **incident to the judgment by reason of the statute, 28 U.S.C. § 2411(b), from the date of the entry of said judgment in the district court.**

A judgment was rendered against the Government on December 6, 1961 in the Meyer and Brady cases, and the judgment was affirmed by this Court on June 13, 1963. The petition of the Government for issuance of a writ of certiorari was denied on December 16, 1963. The Government asked leave to file its "Conditional Petition for Rehearing" in the Supreme Court on June 10, 1964. This motion is still pending. The Government has not paid the part of the judgment awarding damages for the pecuniary loss caused by the deaths of Paul Frank Meyer and Kendall Jesse Brady, the decedents, and is now refusing to do so.

Congress provided in 28 U.S.C. §2411(b) that on all final judgments rendered against the United States under the Federal Tort Claims Act,

> " . . . interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for the payment of the judgment."

The same Act provided, 28 U.S.C. §2674, that the United States shall be liable under the Act, in the same manner and to the same extent as a private individual under like circumstances, but not for the interest prior to judgment. Post-judgment but not pre-judgment interest is therefore to be computed by reason of the statute on any judgment rendered against the United States under the Federal Tort Claims Act.

The Government cites no case upholding its contention that post-judgment interest allowed by 28 U.S.C. §2411(b) is not recoverable unless the district court judgment or the mandate specifically provides

for it. It will be seen that the appellant is asking this Court to lay down an unjust and inequitable rule, to which no court has subscribed, that post-judgment interest on a judgment in a Federal Tort Claims Act case, as provided by Congress in 28 U.S.C. §2411(b), with reference to judgments against the United States, should not be recoverable, even though the judgment of the district court has been affirmed, if the mandate of this Court does not specifically so provide, despite the fact that the Government has not paid the judgment.

The Government impliedly concedes by its argument that if this Court had included in its judgment order or mandate on June 13, 1963, a provision that interest be computed on the judgment under 28 U.S.C. §2411(b), the plaintiffs in the Meyer and Brady cases would be entitled to interest on the judgment as provided by statute, unless 31 U.S.C. §724(a) excludes application of 28 U.S.C. §2411(b) to the judgment entered by the District Court on December 6, 1961.

If a court could not properly prevent application of that statute by specifically denying post-judgment interest to which the plaintiffs were legally entitled, shall it be held that the right to recover post-judgment interest is lost if the judgment or mandate is silent on the subject of "interest."

It is believed that this problem of "interest on judgments" is sensibly dealt with in the "Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure," Rule 37 (March, 1964), submitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. In its proposed draft of Uniform Rules, p. 76, the Committee proposes the following rule:

> Rule 37. Interest on Judgments
>
> "If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a

judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest."

The "Advisory Committee's Note" delineates the problem with such clarity that it is deemed appropriate to set it out in full.

"The first sentence makes it clear that if money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (see 28 U.S.C. §1961 and §2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. There has been some confusion on this point. See Blair v. Durham, 139 F.2d 260 (CA 6, 1943) and cases cited therein.

"In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal. In Briggs v. Pennsylvania RR., 334 U.S. 304 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the Briggs rule. Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the man-

date should be entitled to seek recall of the mandate for determination of the question."

The Committee's Note fully sustains the position of appellees that "the interest which attaches to money judgments by force of law (see 28 U.S.C. §§1961 and 2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest."

Examination of the rules of the various circuits discloses that Rule 32 of the First Circuit; Rule 26 of the Second Circuit; Rule 34 of the Third Circuit; Rule 20 of the Fourth Circuit; Rule 30 of the Fifth Circuit; Rule 25 of the Sixth Circuit; Rule 21 of the Eighth Circuit; Rule 24 of the Ninth Circuit; and Rule 25 of the Tenth Circuit all provide that where a judgment or decree of a lower court was affirmed, interest shall be calculated from the date of the judgment or decree below until the judgment is paid. The District of Columbia Circuit and the Seventh Circuit had no rule dealing specifically with the problem, but see Titles 28, Sec. 2708 and 2701 District of Columbia Code.

II

Interest is to be computed on an affirmed judgment against the United States under the Federal Tort Claims Act despite the absence of any reference to the subject of post-judgment interest either in the judgment of the district court or in the opinion and judgment of this Court. While reference to "interest" in said judgments would not be error, such reference is unnecessary and improper.

Interest which is recoverable by reason of the statute, 28 U.S.C. §2411(b), follows as an incident of the judgment, need not be mentioned in the judgment, and is simply to be computed by the clerk of the court.

In *Freeman on Judgments*, §89, pp. 156, 157 (1925), the author states:

> "So far as interest on the judgment itself is concerned, though it is perhaps not error to do so, there is ordinarily no occasion for mentioning it in the judgment, since it follows as a legal incident from the statute providing for it."

In accord are: 30 Am. Jur., Interest, § 24, p. 23, 47 C.J.S. Interest, pp. 34, 53.

In 'Interest on Judgments in the Federal Courts," 64 Yale L. J. 1019, 1022, footnote 10 (June, 1955), the writer states:

> "Interest upon a judgment secured by positive law is as much a part of the judgment as if expressed in it. Blair v. Durham, 139 F.2d 260, 261 (6th Cir. 1943); Amis v. Smith, 41 U.S. (9 Pet.) 301, 311 (1842) (dictum). See also United States v. Verdier, 164 U.S. 213, 218 (1898); Briggs v. Pennsylvania R.R., 334 U.S. 304, 312 (1948) (dissenting opinion); Moore-McCormack Lines, Inc. v. Amirault 202 F.2d 893, 895 (1st Cir. 1953) (dictum); National S.S. Co. v. Tugman, 82 Fed. 246 (2nd Cir. 1897); 1 Freeman Judgments, § 89 (5th ed. 1925)."

And, at pp. 1025, 1026:

> "Thus an order by the appellate court that the judgment be affirmed is to be interpreted by the lower court as a direction to continue in effect an interest-bearing judgment. When the lower court allows interest from the date of the appealed judgment, therefore, it is following the mandate rather than enlarging upon it." Citing, Blair v. Durham, 139 F.2d 260 (6th Cir. 1943). See also Eugene R. Smith Co. v. Russek, 212 F.2d 338 (5th Cir. 1954); Bradford v. Commonwealth Trust Co., 98 F.2d 655 (3rd Cir. 1938) (by implication); City of Tacoma v. Hoffman, 72 F.2d 721 (9th Cir. 1934) (by implication); St. Petersburg Advertising Co. v. American Motorsign Co., 25 F.2d 397 (5th Cir. 1928); Myers v. Velasquez, 16 F.2d 111 (5th Cir.

1926) (by implication); United States v. Henke Constr. Co., 68 F. Supp. 3, 5 (W.D. Mo. 1946) (dictum).

The results of a survey reported at p. 1026, disclosed that:

> "Moreover, thirty-five of the thirty-six district court clerks who responded to a questionnaire reported that they allow interest on an affirmed judgment even when, as is usually the case, the mandate of affirmance makes no mention of interest."

Twenty out of twenty-nine clerks reported that mandates omit any mention of interest in one hundred percent of the cases. Eight additional clerks report this result occurs in at least ninety-five percent of the cases (Footnote 29). The author advocates the view that interest runs from the date of a judgment entered in the court regardless of the use or absence of the words "with interest" and states, p. 1028:

> "The complete application theory is the only one which assures that interest will fulfill its proper function in the judicial process. Interest is a mechanism which aids in the function of the entire process—namely, to render a wronged party "whole." Since the lower court judgment * * * which is computed up to that time render (s) the plaintiff whole as of the date of that judgment, interest must be allowed on this aggregate sum from judgment until payment to render the plaintiff whole at date of payment."

In *Moore-McCormack Lines v. Amirault*, 202 F.2d 893 (1st Cir. 1953), the court, in discussing the running of post-judgment interest, referred to 28 U.S.C. §1961, which goes back to an Act enacted in 1842, and stated, p. 895:

> "Interest upon the amount of a money judgment rendered by a federal court runs automatically, by the mandatory provision of 28 U.S.C. §1961, even though the judgment it-

> self—as in the case at bar—contains no specific award of such interest. Blair v. Durham, 6 Cir., 1943, 139 F.2d 260. This is provided for as a matter of routine in the writ of execution issued by the Clerk of the Court to the U.S. Marshal commanding him to cause to be paid and satisfied unto the judgment creditor, out of the property of the judgment debtor within the district, the amount awarded in the money judgment 'with interest thereon from said day of the rendition of said judgment.'"

In *Blair v. Durham*, 139 F.2d 260 (6th Cir. 1943), a judgment was entered on a jury verdict, and the judgment was silent on the question of interest. The judgment was affirmed and the mandate was also silent on the question of interest. Subsequently, some months later, the court entered an order providing in substance that the judgment bore interest from its date until payment calculated at the rate of similar judgments in Tennessee, "and that the allowance of such interest was implied in the court's mandate." The defendant contended that where the mandate affirming the judgment for the plaintiff was silent on the question of interest, and the judgment also is silent on the question of interest, the district court has no power to allow interest, and that the court of appeals lacked jurisdiction to enter the order enlarging the mandate six months after its issuance. The court held that 28 U.S.C. §811 makes it mandatory that (post-judgment) interest be allowed on (affirmed) judgments recovered in a district court, and that such interest is collectible as a part of the judgment by execution, conformable to the law of the state in which the court tendered the judgment. The court stated, p. 261:

> "Interest upon a judgment secured by positive law is as much a part of the judgment as if expressed in it. Amis v. Smith, 41 U.S. 301, 311, 16 Pet. 303, 10 L.Ed. 973; National S.S. Co. v. Tugman, 2 Cir., 82 Fed. 246."

The Court further stated, p. 261:

> "There is ordinarily no occasion for mentioning statutory interest in a judgment since such interest follows as a legal incident from the statute providing for it. Massachusetts Benefit Association v. Miles, 137 U.S. 689, 692, 11 S. Ct. 234, 34 L.Ed. 834.
>
> *****
>
> "The court, in the present case, had no discretion in the matter of withholding or awarding interest. Therefore, the fact that the judgment of the trial court and the mandate of this court made no specific award of interest, is immaterial. The allowance of the legal rate of interest under the laws of the State of Tennessee and for the period provided under 28 U.S.C.A. §811, was mandatory."

To the same effect, see *Harris v. Chicago Great Western Ry. Co.*, 197 F.2d 829 (7th Cir. 1952).

The Government makes the point that the plaintiffs did not ask for interest in the District Court proceedings (Appellant's Br. 11). The claim was one for unliquidated damages and interest would be recoverable only when and if a judgment was obtained. It was unnecessary to ask for interest on the judgment, it was provided for as a matter of law, and upon computation must be paid by a defendant tortfeasor against whom a money judgment has been entered.

The argument made by the Government and the cases which it cites on the question show that the appellant has approached this problem of post-judgment interest as though the issue involved in this case was the right to recover pre-judgment interest, or to recover interest which is allowable by a court of review only as a matter of discretion.

In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (Appellant's Br. 16, 17), one of the cases upon which the Government principally relies, the court of appeals reversed an order of the district court dismissing the action after the jury returned a verdict for the plain-

tiff, and directed that judgment be entered on the verdict for the plaintiff, 153 F.2d 841. The district court then entered judgment in favor of the plaintiff, but added pre-judgment interest from the date of the verdict to the date of the judgment entered pursuant to the mandate, apparently on the theory that the plaintiff would have been entitled to interest under 28 U.S.C. §1961 if the trial court had ruled correctly and entered judgment on the verdict in favor of the plaintiff, and that the plaintiff should not be deprived of interest from that time until judgment was in fact entered in her favor pursuant to the mandate. The Supreme Court held that an inferior court has no power or authority to deviate from the mandate of an appellate court by allowance of (pre-judgment) interest, and that the interest allowed was therefore in excess of the terms of the mandate. The statute involved in Briggs, 28 U.S.C. §811 (now 28 U.S.C. §1961), provided that interest shall be allowed on all judgments in civil causes, but the plaintiff did not have a money judgment in her favor until the district court entered it pursuant to the mandate.

The plaintiff did not move at any time to amend the mandate which made no provision for pre-judgment interest and the court held that therefore the question whether interest might on proper application have been allowed for the period between dismissal of the complaint by the district court until entry of judgment pursuant to the mandate "is not reached." Section 811 does not explicitly provide for the allowance of interest when a judgment for the defendant is reversed on appeal with directions to enter judgment for the plaintiff, *Briggs*, footnote 15, p. 314.

The defendant's present contention goes utterly beyond the *Briggs* holding. The defendant, contends, in effect, that after judgment was finally entered for *Briggs* in the district court pursuant to the mandate, no interest would be computed on that judgment from the time of its entry because the mandate was silent on that subject. Defendant cites no case so holding.

In *Brown & Root v. American Home Assurance Company*, 321 F.2d 814 (5th Cir. 1963), the district court, on remand, held the judgment should bear interest from February 20, 1959, the date the original decree was entered. On an appeal from this order the defendant relied on *Briggs, supra*, and contended the district court erred in allowing interest since the mandate did not specifically allow it. The court distinguished the *Briggs* case on the grounds that the court of appeals' mandate in that case ordered judgment entered on a jury verdict and the trial court then added pre-judgment interest to the verdict, not post-judgment interest, which was involved in the *Brown & Root case*. And the text writer points out in 1 A.L.R. 2d 479, 484, 485 (1948) that *Briggs, supra*, held only that where the mandate is silent on the subject, the district court cannot properly add pre-judgment interest under 28 U.S.C. §1961.

In re Washington and Georgetown R. Co., 140 U.S. 91 (1891) (Appellant's Br. 14), the plaintiff obtained a judgment on a jury verdict in his favor for injuries suffered by him in the District of Columbia. Apparently at that time no law of the District of Columbia provided for interest on a tort judgment and state law was not applicable to the case. Interest did not follow as an incident of the judgment but was only recoverable if allowed as a matter of discretion by the reviewing court. The general term and the Supreme Court affirmed, saying nothing about interest. On remand, the district court allowed interest on the judgment. The Supreme Court held this was error and that it was the duty of the district court to follow the mandate. The court stated, p. 97:

> " * * * (W)e render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms * * * ."

Compare the above holding with that in *Massachusetts Benefit Association v. Miles*, 137 U.S. 689 where the court held pre-judgment interest (between the date of the verdict and judgment) was recoverable under an applicable Pennsylvania statute even though the judgment of the lower court made no reference to the subject of interest.

Steiner v. Nelson, 309 F.2d 19 (7th Cir. 1962), which the appellant quotes from as "directly in point" (Appellant's Br. 16, 17) is not in point and does not sustain its contention. The statutes relied upon by plaintiffs as the basis of their claim for interest were not applicable against the Government and a claim for interest against the Government does not lie unless it is expressly provided for by contract or statute, *United States v. Goltra*, 312 U.S. 203; *Dresser v. United States*, 180 F.2d 410 (10th Cir. 1950). Thus the plaintiff could not recover pre-/or post-judgment interest; no statute authorized recovery of interest from the Government under the circumstances of the case. The statement in *Steiner* that the holding in *Blair v. Durham*, 139 F.2d 260 (6th Cir. 1943), (that post-judgment interest attached by operation of law as a legal incident of a statute) had been overruled impliedly by the majority opinion in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, discloses a misunderstanding of *Briggs*, however, since it has been shown that the majority opinion did not pass on the question whether post-judgment interest would attach to an affirmed judgment as an incident of a statute where the mandate was silent on the subject.

Himley v. Rose, 5 Cranch 311 (1809), (Appellant's Br. 13, 14), is not in point. No statute provided for the payment of interest. Chief Justice Marshall indicated that the question of (pre-judgment) interest was "doubtful" but that the Court was of the opinion appellants ought not to be charged interest.

Givens v. Missouri-Kansas-Texas R. Co., 196 F.2d 905 (5th Cir. 1952) (Appellant's Br. p. 17), does not support the proposition for which appellant cites it. The case was before the court under 28

U.S.C. §1961, a different statute than those involved here. The mandate did provide for payment of pre-judgment interest, after being modified at the request of the plaintiff.

In *United States v. Hougham*, 301 F.2d 133, 134, 135 (9th Cir. 1962) (Appellant's Br. 17), which involves 28 U.S.C. §1961, the mandate was silent on the subject of interest. The court held that the district court correctly applied §1961 in awarding only post-judgment interest.

Appellant asserts that following the decision in *Briggs, supra,* where the mandate of the reviewing court makes no provision for interest, the district court has no authority to deviate from the mandate by awarding interest. In support of this statement the appellant cites *Steiner, supra,* previously discussed by appellees, and three additional cases (Appellant's Br. 17). *Lee v. Terminal Transport Co., Inc.*, 301 F.2d 234 (7th Cir. 1962), which arose under 28 U.S.C. §1961, involved only a claim for pre-judgment interest.

In *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 213 F.2d 443 (2nd Cir. 1954) (Appellant's Br. 17), which involved 28 U.S.C. §1961, an action was brought for an accounting. The court of appeals, on the original appeal, remanded, ordering that the amount to be recovered be substantially increased. The district court entered judgment for the additional amount but allowed interest on the additional amount from the date of the original decree although the mandate had not so directed. This was held error.

In *Bankers Life and Casualty Co. v. Bellanca Corporation*, 308 F.2d 757 (7th Cir. 1962) (Appellant's Br. 17) the mandate of affirmance provided for payment of the judgment "with interest * * * " in accordance with the opinion of the court of appeals. The court held this language granted the right to interest on the original judgment for the period during which cross-appeals were pending.

The Government asserts that the interests of society bar the plaintiff from maintaining a subsequent action on the same cause of action, and cites Restatement, Judgments §§47, 68 (Appellant's Br. 12, 13), which do not bear in any way on the right to recover post-judgment interest. Nor does *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) (Appellant's Br. 12, 13) deal in any way with the right to recover post-judgment interest on a judgment.

This is not a second action on the same cause of action, it is simply an attempt on the part of appellees to execute on their judgments and to collect the interest to which they are justly entitled under the law.

III

The provisions of 31 U.S.C. § 724(a) apply only if the judgment or judgments in any one case do not exceed $100,000, and said statute therefore has no application to the judgment rendered in the Brady and Meyer cases which included an award of $170,000 for damages caused by the death of Paul Frank Meyer, and $248,000 caused by the death of Kendall Jesse Brady, deceased.

The appellant contends that the award of $170,000 for the damages caused by the death of Paul Frank Meyer, and the award of $248,000 for the damages caused by the death of Kendall Jesse Brady, which amounts were apportioned to the widow and minor child of each decedent by the district court, as required by the Wrongful Death Act of Maryland, constituted a separate "judgment" for each widow and child, and that each of these "judgments" which are under $100,000 is subject to the provisions of 31 U.S.C. §724(a) which applies where the "judgments" in any one case do not exceed $100,000. The result of the Government's contentions, if accepted, would be to deny recovery of interest in the Brady and Meyer cases on the affirmed judgment entered December 6, 1961.

Where interest is not recoverable under 28 U.S.C. §2411(b) by reason of the limitations of 31 U.S.C. §724(a), inclusion of provision in the judgment in the district court when originally entered that interest will be payable at 4% per annum, has been held erroneous. *United States v. Jacobs*, 308 F.2d 906 (5th Cir. 1962). Under the holding in *Jacobs*, the allowance or refusal of interest on a money judgment in a Federal Tort Claims Act appears to be a matter governed by statute, not the wording of the judgment or mandate.

A single judgment was entered in the Meyer and Brady cases in the District Court, the judgment was in excess of $100,000, and it is clearly outside the scope and provisions of 31 U.S.C. §724(a). The judgment in the Meyer case was $170,000, and in the Brady case was $248,000, clearly not governed by the provisions of 31 U.S.C. §724(a) which were limited by Congress to the situation where the "judgments" are not in excess of $100,000 in any <u>one</u> case.

Congress had refused to pass a statute giving the Comptroller General authority where the judgments in any once case exceeded that amount despite his request for it, and 31 U.S.C. §724(a) was a compromise adopted at the request of the Comptroller General which he represented would eliminate objections to the 1954 bill and would "satisfy approximately 98 or 99 percent of the judgments rendered." The remaining 1 or 2 percent "will continue to be handled as at present." H. Rept. 2638, 84th Cong. 2d Sess. p. 72.

Under the Wrongful Death Act of Maryland, the "amount recovered" is to be divided between the equitable plaintiffs by the jury (by the judge, when he is the trier of the facts). In *Passapae v. Oehring*, 141 Md. 60 (1922), in which the jury rendered a verdict for a single amount and did not apportion it between the equitable plaintiffs, the defendant contended that the judgment should be stricken because of the failure of the jury to determine "the shares in which the amount recovered should be received by the parties for whose benefit the suit was brought."

The Court stated, p. 62:

> "The evident purpose of the statute is that if the jury should find for the plaintiffs, in a case of this nature, the damages awarded should first be stated as an aggregate sum in the verdict, and this has been the general practice. It is the 'amount so recovered' that 'shall be divided amongst' the parties 'in such shares as the jury by their verdict shall find and direct.' By the verdict in this case the defendant's liability was determined, and the whole amount of the damages sustained by the plaintiffs was definitely stated." (Emphasis supplied.)

The court then went on to hold that the defendant was not prejudiced by the failure of the jury verdict to apportion the damages, that the defendant's interest.

> " * * * was in the amount of the damages and not in their apportionment. * * * The question as to the division of the fund is one which concerns the rights and interests of the plaintiffs as among themselves and does not affect the existence or measure of the defendants' liability" (Emphasis supplied.)

The court cited *Central Vermont R. Co. v. White*, 238 U.S. 507, in which a suit was brought under the Federal Employers' Liability Act for the benefit of the widow and minor children of a brakeman killed in the service of the defendant railroad. Following a general verdict for the plaintiffs, the defendant filed a motion in arrest of judgment contending the judgment should be set aside because the damages were not apportioned by the verdict amongst the widow and children. The court overruled the defendant's contention and stated:

> "'Under Lord Campbell's Act (9 & 10 Vict. chap. 93, sec. 2) and in a few American states, the jury is required to apportion the damages in this class of cases. But even in those states the distribution is held to be of no concern to the defendant, and the failure to apportion the damages is

> held not to be reversible error (citing cases)—certainly not unless the defendant can show that it has been injured by such failure.'"

The court further stated in *Passapae, supra,* that the discussion of the problem by the Supreme Court indicates that it did not regard the question " * * * as one in which the defendant was concerned * * * "; that the defendant had no actual interest in having the shares of the plaintiffs fixed by the verdict, and had no right to a retrial of the case simply because the shares had not been so defined. This reasoning is directly applicable to the issue before the Court in the instant case. See *Texas & Pac. R. Co. v. Gentry,* 163 U.S. 353.

The appellant cannot deny that if judgment was entered for a single amount for the total damages to the plaintiff suing for the benefit of the Meyer family and also for a single amount for the damages to the Brady family, the judgment would clearly have exceeded $100,000. By no stretch of the imagination could it then be said that 31 U.S.C. §724(a) applies. The mere fact that the court apportioned the damages to the members of each family was "of no concern" to the appellant and did not render 31 U.S.C. §724(a) applicable.

The views of the Comptroller General in *In re Hayashi,* 40 Comp. Gen. 307 (Appellant's Br. 26, 27, 28), must be evaluated in the light of the Hawaiian wrongful death statute under which the actions were brought and will be found not of controlling importance here. The opinion in *Hayashi* discloses that separate judgments were in fact awarded to the widow and to each of the children of the decedent, and the Hawaiian Wrongful Death Act apparently permitted the widow and each child to bring an independent action for damages. Under the Revised Laws of Hawaii, 1955, Vol. II, Ch. 246-2, the action for wrongful death may be brought by "the deceased's legal representative, or any of the persons hereinafter enumerated * * * ." The persons enumerated are

"the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person." And the opinion of the Comptroller General states that " * * * each plaintiff has a cause of action against the United States and could have sued individually" (p. 308). The Hawaiian Act is thus dissimilar from the Maryland statute which, as will be shown, permitted only one action, in the name of the State of Maryland.

And where the interpretation of a statute is unreasonable and results in an extension of the authority of the office of the Comptroller General over a case where the judgments exceeded $100,000, authority which Congress had specifically refused to grant, the opinions expressed cannot be accepted as authoritative. The result arrived at in *Hayashi* was made possible only by ignoring completely the words in the statute "in any one case", and by gratuitously adding language that the statute does not apply where a sum in excess of $100,000 is "awarded either to a single plaintiff or to two or more plaintiffs jointly," although no such language appears in the statute.

8 West's Maryland Law Encyclopedia, Death, Sec. 16, p. 165, states that under Sec. 4 of the Code, every action for wrongful death shall be brought by and in the name of the State of Maryland for the use of the persons entitled to damages, that not more than one action shall lie for and in respect of the same subject matter of the complaint, and although the plaintiff may sue separately different joint tortfeasors, "the object of the statute is to protect a defendant from several suits for the same injury."

In *State of Maryland for the Use of Bashe v. Boyce*, 72 Md. 140 (1890), the court held that under the Maryland Wrongful Death Act, only one suit can be brought against the same defendant, and

> "therefore, all who have a right to unite as plaintiffs but who omit to become parties, are excluded from bringing a subsequent action. Dexford v. State, etc., 30 Md. 208. Its

> object was to protect a defendant from being vexed by several suits instituted by or in behalf of different equitable plaintiffs for the same injury, when all the parties could, with perfect convenience, be joined in one proceeding."

The Wrongful Death Statute of Maryland in effect at the time of the occurrence, and of the bringing of this action, provided that the plaintiff shall be the State of Maryland and that the action be brought in the name of the state for the use of the equitable plaintiffs. In an action for the wrongful death of a person under the Maryland statute, there can be only one plaintiff for each wrongful death action. In 16 Am. Jur. Death, §262, pp. 179, 180, it is stated that:

> "[T]he general rule is that the action is maintainable only in the name of the person designated by the statute * * * . The right of the particular person to maintain the action is as essential as the liability of the defendant * * * . * * * In accordance with the above-stated rules, where, as in Lord Campbell's Act and those statutes modeled thereon, the right of action is given to the personal representatives for the benefit of certain designated persons, the beneficiaries may not personally sue. Under such a provision, the action must be brought and must be maintained to the end by the personal representative of the person for whose death the damages are sought."

And see Harper and James, The Law of Torts, Vol. 2, §30.5, p. 1695.

In accord are *Heath v. United States*, 85 F.Supp. 196 (D.C. Ala. 1949), involving a claim under the Federal Tort Claims Act for a death which occurred in Alabama; *Kunkel v. United States*, 140 F.Supp. 591 (D.C. Cal. 1956); and *Olson v. United States*, 175 F.2d 510 (8th Cir. 1949).

In the extensive annotation in 1 L.ed.2d 189, at p. 1647, the text and cases cover many aspects of claims under the Federal Tort Claims Act which are governed by state law. At p. 1663, it is stated:

> "The general rule would seem to be that the capacity of a party to maintain an action against the United States under the Federal Tort Claims Act is governed by the law of the state in which the injury was sustained for which recovery is sought." Citing Heath v. United States, 85 F.Supp. 196 (D.C. Ala. 1949); Kunkel v. United States, 140 F.Supp. 591 (D.C. Cal. 1956); Olson v. United States, 175 F.2d 510 (8th Cir. S.D. 1949); Zaccari v. United States, 130 F.Supp. 50 (D.C. Md. 1955)."

The conclusion of the district court in Meyer and Brady, that under the law of Maryland there could be only one cause of action for each wrongful death regardless of the number of surviving children, was sound and correct.

The Government is thus in error when it argues that each of the minor children as well as widows of the decedents, whom the Government describes as "the individual plaintiffs," "undoubtedly could have brought an individual action under the Federal Tort Claims Act for his financial loss." (Appellant's Brief, 33). No authority existed for the fragmenting of the single right of action for the wrongful death of Meyer or the single claim for the wrongful death of Brady into numerous separate lawsuits by each minor child and by the widow of each decedent and no case is cited to show that any such right arose or existed under the Wrongful Death Statute of Maryland.

Appellant refers to the fact that the State of Maryland has repealed (subsequent to the bringing of the present action) the provision of its Wrongful Death Act requiring that the action should be brought in the name of the State of Maryland. It is true that the statute was amended in 1962, deleting that particular requirement, but the statute as re-enacted retained the requirement "that not more than one action shall lie for and in respect of the same subject matter of complaint" and refers to the action throughout as a single action to recover damages for the benefit of those persons suffering damages by reason of the decedent's death.

The Maryland statute, as now amended, and Maryland Rules Q 41, 43, provide that the action shall not be in the name of the State of Maryland, but

> "all persons who are or may be entitled to damages * * * shall be named as plaintiffs whether or not they joined in bringing the action * * * ."

The argument of the Government that the Comptroller General's interpretation of 31 U.S.C. §724(a) is generally more favorable to plaintiffs than advocated by the plaintiffs here is not persuasive. But whether it would be more advantageous or less advantageous to a plaintiff in a given case is entirely aside from the point. The question is what does the law provide, and not how may it be interpreted and enlarged so as to provide something that Congress never granted and never intended. Plaintiffs do not contend for what the Government characterizes as a "narrow construction" (Appellant's Brief, 30), but for an accurate and correct interpretation of the Act to effectuate the intent of Congress.

Appellant asserts (Appellant's Br., p. 34) that the plaintiffs did not comply with the Federal Rules which require that suits be brought in the name of the "real party in interest * * * ," and that the provisions of the Maryland Wrongful Death Act providing by whom the action should be brought "can have no effect in a Federal court suit, for the Federal Rules require that suits be brought in the name of the real party in interest * * * " Appellant also states that whether the actions may be brought individually or together is a procedural matter governed by the Federal Rules of Civil Procedure, and that proceeding to judgment, if a party having a joint interest is absent, "does not affect the rights and liabilities of absent parties" referring to Rules 19(a) (b) Federal Rules of Civil Procedure. As previously shown, state law governs as to parties and capacities to sue under the Federal Tort Claims Act.

Rule 17 of the Federal Rules of Civil Procedure, providing that an action must be brought in the name of a real party in interest, has never been given the effect for which appellant contends when it asserts that the plaintiffs did not comply with the rule, and thus clearly suggests that the action should have been commenced in the name of the widow and minor children of each decedent (Appellant's Br. 34). In fact, Rule 17 provides:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. * * * In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * * ."

In *Van Wie v. United States*, 77 F.Supp. 22 (D.C. Iowa 1948), it was held that the administratrix authorized by state law to bring the action was the "real party in interest." To the same effect see *Blackwell v. Vance Trucking Co.*, 139 F.Supp. 103 (D.C.S.C. 1956); *Greene v. Goodyear*, 112 F.Supp. 27 (D.C. Pa. 1953); *Breeden v. Atlantic Coast Line R. Co.*, 86 F.Supp. 964 (D.C.S.C. 1949); *Jaffe v. Philadelphia & W.R. Co.*, 80 F.Supp. 416 (D.C. Pa. 1948); *O'Donnell v. Elgin J. & E. Ry. Co.*, 193 F.2d 348 (7th Cir. Ill. 1951), cert. den. 343 U.S. 956; *Nolan v. Trans Ocean Airlines*, 276 F.2d 280 (2d Cir. N.Y. 1960), set aside on other grounds 365 U.S. 293, on remand 290 F.2d 904, cert. den. 368 U.S. 901; *McElroy v. Security National Bank of Kansas City*, 215 F.Supp. 775 (D.C. Kan. 1963); *Oskoian v. Canuel*, 269 F.2d 311 (1st Cir. R.I. 1959); and *Erwin v. Barrow*, 217 F.2d 522 (10th Cir. Okla. 1954).

Under the Maryland Wrongful Death Act, the State of Maryland fulfills the role ordinarily filled by the administrator under the Wrongful Death Act of many states. The action had to be brought in the name of the State of Maryland for the beneficial plaintiffs, just as in many states the action is brought in the name of the administrator in behalf of the dependent next of kin.

Nor can Rule 19(b) be given the effect for which defendant contends (Appellant's Br. 33). Rule 19 must be construed together with the language from Rule 17(b), referred to above. Rule 19(b) refers to the failure to join as parties plaintiff or defendant, "persons who are not indispensable * * * ." If each claimant were permitted to bring a separate suit without being compelled to have his rights adjudicated in one action, there could conceivably be a double, triple or even quadruple recovery of damages above and beyond the amount that properly would be allowed if the court had all claimants before it at the same time so that it could determine what decedent's earnings were and the extent of the dependency of the respective claimants, the widow and minor children, as in the instant cases.

Rule 19(a) likewise cannot be given the construction for which defendant contends (Appellant's Br. 33). The widow and minor children of each decedent did not have a right to join or be made parties plaintiff, and Rule 19(a) did not establish that right, or nullify the provisions of the Maryland Wrongful Death Act, Maryland Annotated Code, Art. 67, §4, which provided that the action is to be brought in the name of the State of Maryland as the plaintiff.

Rule 20 of the Federal Rules of Civil Procedure for the United States District Courts does not authorize splitting this single right of action into several separate claims to be brought by the widow and minor child of each decedent. The Government would be the first to protest and properly so against being subjected to the harassment of numerous separate lawsuits by the surviving next of kin of the decedents, which conceivably could then be brought in various parts of the United States to recover damages arising out of the death of one person.

As the district court pointed out in these cases, the court wanted to determine the total damages sustained by each of the families of Meyer and Brady, the decedents, and the court would then make the

apportionment or division between the widow and minor children of each decedent (J.A. 838 in Cases No. 16,953; 16,954; 16,955).

IV

If the Court concludes that such interest is recoverable only if this Court specifically provides for it in the judgment order or mandate, then appellees ask the Court to exercise its discretionary power to amend its mandate to provide nunc pro tunc that interest shall be computed on the said judgment.

The court unquestionably has the right to correct its mandate, and if this judgment does not carry interest by operation of law by virtue of the provisions of 28 U.S.C. §2411(b), unless the judgment specifically provided "with interest," then it is respectfully suggested that this court, to do justice between the parties, should amend its mandate nunc pro tunc to provide for the payment of post-judgment interest from the date of the entry of the judgment on December 6, 1961. There were valid grounds for appellees believing that the judgment did carry interest as an incident to the judgment, by virtue of the statute referred to, but in view of the fact that the Government declines to pay interest on the judgment, this court can resolve that issue.

A judgment may be corrected at any time, after term, as well as during term, where it involves correction of a clerical not a judicial act. With this precise problem before it in *Blair v. Durham, supra.*, the court ordered correction of its mandate about six months after its issuance, to allow post-judgment interest and in response to the contention of the defendant that the court was without jurisdiction to make this correction, the court stated, pp. 261, 262:

> "This contention must be denied. The power of the court to amend its records so as to make them speak the

> truth is not lost by the lapse of time where the errors or omissions in the court's records do not arise from judicial acts of the court and the corrections are necessary to truly show the court's past proceedings. In re Wright, 134 U.S. 136, 144, 10 S. Ct. 487, 33 L.Ed. 865; Insurance Company v. Boon, 95 U.S. 117, 127, 24 L.Ed. 395."

The calculation of interest is regarded as a mere clerical act, not a judicial function. Freeman on Judgments, §153, p. 300 (1925).

It would be a very great injustice to the surviving family of the decedents, Brady and Meyer, to deny them interest on the judgment entered in their favor, which said interest now exceeds $40,000, if the mere use of appropriate words by the clerk would have entitled them to interest on the judgment.

In *American Trucking Assoc. v. Frisco Transp. Co.*, 358 U.S. 133, (1958) the court stated, p. 145:

> "It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake." (Citing Gagnon v. United States, 193 U.S. 451; Rule 60(a) of the Federal Rules of Civil Procedure.)

CONCLUSION

It is therefore respectfully suggested that post-judgment interest follows as an incident of the judgment for the plaintiffs entered in the District Court on December 6, 1961, by virtue of 28 U.S.C. §2411(b) and the absence of any reference to "interest" in the judgment is immaterial; that the right to recover interest on the judgment is not governed by 31 U.S.C. §724(a); and that if this Court deems it necessary that its mandate specifically indicate the right to post-judgment

interest on the judgment, before such interest is recoverable, that this Court in the exercise of a sound and equitable discretion amend its mandate nunc pro tunc to so provide.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,676

UNITED STATES OF AMERICA, APPELLANT,

v.

STATE OF MARYLAND for the use of
MARY JANE MEYER, ET AL., APPELLEES.

No. 18,677

UNITED STATES OF AMERICA, APPELLANT,

v.

STATE OF MARYLAND for the use of
VANCE LEWMAN BRADY, ET AL., APPELLEES.

ON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

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I N D E X

CITATIONS

Cases:

* Cases primarily relied upon.

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UNITED STATES COURT OF APPEALS

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v.

STATE OF MARYLAND for the use of
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ON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR APPELLANT

The reasons for reversing the district court's order of April 1, 1964, awarding interest on its judgments of

December, 1961, which did not provide for the payment of interest, and which had been affirmed on appeal without any provision for interest, are set forth fully in our main brief. However, in their brief appellees have requested for the first time, in the alternative, that this Court grant them, nunc pro tunc, the interest which the district court attempted to award. This brief will therefore be our response to the new request for relief made by appellees, and a reply brief addressed chiefly to the authorities and reasons relied upon by appellees to support the district court's order, most of which were not called to the attention of, or considered by, the district court.

1. The Appellees' Request for Amendment of this Court's Mandate.

For the first time in this litigation appellees, in their brief filed September 24, 1964, have requested that this Court amend, nunc pro tunc, its order and judgment, entered over 15 months previous (June 13, 1963), and issued in lieu of mandate over 14 months previous, so as to provide for the award of interest from the entry of the district court judgments, entered almost 33 months previous (December 6, 1961). Brief for Appellees, pp. 31-32. This request should be denied as untimely and improper.

Counsel for appellees prepared the form of judgments which were entered in the district court, and did not file any motion to amend the judgment, nor any notice of appeal. Similarly, the appellees had never requested interest in their complaints or elsewhere in the district court. Appellees were therefore in no position to complain of district court error in its failure to provide for interest in its judgment. Moreover, if, as we believe, the provisions of 31 U.S.C. 724a apply to the judgments to seven out of the eight appellees here (see Main Brief, pp. 20-34), no interest could have been awarded them on the prior appeal. Even if the appellees had raised the question of interest while these cases were pending before this Court on the prior appeals, it is therefore doubtful that it would have been appropriate to award them the relief which they now seek more than 14 months after the issuance of this Court's mandate.

But appellees made no such request when these cases were before this Court, or at any time during that term of this Court. Instead they waited until April 1, 1964, approximately nine months after the issuance of this Court's opinion and judgment in lieu of mandate, to assert their claim for interest in the district court, and until September 24, 1964, to assert that claim for the first time

in this Court. The untimely request in this Court has all of the defects of piecemeal litigation which inhere in the tardy request made in the district court.

The Seventh Circuit has twice considered such requests to recall and modify mandates issued in earlier terms to insert or delete provisions for interest, and has in each instance denied such requests as untimely. Lee v. Terminal Transport Co., 301 F. 2d 234, 236 (C.A. 7, 1962); Bankers Life and Casualty Co. v. Ballanca Corp., 308 F. 2d 757, 759 (C.A. 7, 1962). In the latter case the mandate had issued on October 17, 1961, and the Court denied the request for relief made less than a year later for the following reasons (308 F. 2d at 759):

> Bankers took no timely action in this Court to request a recall and modification of the mandate for the purpose of obtaining the relief to which it claims it is entitled. It is now too late for it to do so. Lee v. Terminal Transport Co., supra. While the power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L. Ed. 1250, it has not been held to survive for the convenience of litigants. Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 48 S. Ct. 97. 72 L. Ed. 168. * * *

Accord: Briggs v. Pennsylvania R. Co., 334 U.S. 304, 306 (quoted in Main Brief, pp. 16-17).

Appellees rely upon Blair v. Durham, 139 F. 2d 260 (C.A. 6, 1943) in support of their request for relief (Brief

for Appellees, pp. 31-32). In that case the Sixth Circuit had affirmed a judgment in favor of the plaintiff-appellee which was silent on the question of interest, and had issued its mandate on June 11, 1943. On September 23 of the same year counsel for appellee asked whether the Court intended its mandate to prohibit the allowance of post judgment interest, and the Court promptly entered an order "that under Ccurt Rule 27 the judgment in question bore interest from its date until payment." 139 F. 2d 260.

The Blair case is distinguishable on several counts. In the first place, this Court has no rule comparable to the Sixth Circuit's Rule 27 (now Rule 25(a)), which in effect directed that mandates of affirmance be construed as awarding interest.[1/] In the second place, the request in Blair was made promptly to the court of appeals, approximately three months after the issuance of the mandate, not 14 months thereafter, as in this case.

The fundamental difficulty with appellee's reliance upon Blair v. Durham, supra, however, is that the basic premise of the decision in that case was that the silence of a judgment in regard to post judgment interest should

1/ Note, Interest on Judgments in the Federal Courts, 64 Yale L.J. 1019, 1025.

be construed as incorporating such interest, when interest is "secured by positive law," and accordingly the failure to provide for interest was an immaterial omission, and that the mandate could be corrected "to truly show the court's past proceedings." 139 F. 2d at 261, 262.

But the Supreme Court in Briggs v. Pennsylvania R. Co., 334 U.S. 304 (1948), later rejected the major premise of the reasoning in Blair. For in that case the Court held that where neither the district court judgment nor the appellate mandate authorize interest, the appellate mandate is to be construed as prohibiting an award of interest, 334 U.S. at 306-307, and rejected the reasoning of Blair, which had been relied upon in the dissenting opinion. See, Main Brief, pp. 16-17, 18. It follows, therefore, that the nunc pro tunc amendment of a mandate so as to provide interest, some 14 months after its issuance, is not a mere "correction" of the mandate "to truly show the court's past proceedings" and the appellate courts should not modify a mandate issued in an earlier term to provide for such interest.

Appellees' contention that the award of interest involves "a clerical not a judicial act" and their assertion that "the mere use of appropriate words" by the

clerk of this Court would have solved this problem (Brief for Appellees, pp. 31, 32) bear little resemblance to the circumstances of this case. The parties here disagree as to which of the special statutes concerning the award of post judgment interest against the United States, 28 U.S.C. 2411 or 31 U.S.C. 724a, applies to the awards to seven out of the eight appellees here. That difference between the parties can only be resolved after an analysis and appraisal of the language of the two statutes, their legislative history and administrative interpretation, and any judicial precedents. Obviously the resolution of such a dispute is a judicial, not a clerical function.[2/] Since appellees could have presented their claim for interest in

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2/ In American Trucking Assns. v. Fresco Transportation Co., 358 U.S. 133, also relied upon by appellees (Brief for Appellees, p. 32), the mistake was indeed clerical, a failure to incorporate in the final order (certificate) a limitation which had expressly appeared in the opinions. 358 U.S. 133, 136-138. That the absence of a provision for interest from the judgment reflected the intent of counsel for appellees (who prepared the judgment) and the court is apparent from the fact that the complaints requested damages and costs, but not interest (J.A. 8-9), and also from their present contention that reference to interest in the judgment is "unnecessary and improper." (Brief for Appellees, p. 12). Errors of serious or substantial nature, and particularly errors which reflect the intention of the parties or the court at the time of the entry of judgment are not, of course, clerical. 6 Moore, Federal Practice (Second Ed., 1953), ¶ 60.06, p. 4043.

a timely manner, together with the rest of their cause of action, so that such disputes could be resolved in the initial district court proceeding, and, if necessary on appeal from the district court judgment, but failed to do so, they should be bound by the final judgments entered in the district court, which were affirmed by the judgment of this Court, and by their failure to make a timely assertion of their claims.

2. The District Court's Authority to Award Interest After Appellate Decision, When Neither Its Judgment Nor the Mandate of Affirmance Made Any Award of Interest.

Appellees' principal contention on the question of the district court's authority to award interest long after its entry of judgment without interest and appellate affirmance of that judgment, is that post-judgment interest "follows as an incident of judgment" under statutes such as 28 U.S.C. 1961 and 28 U.S.C. 2411, so that a district court judgment or an appellate court mandate which is silent on the question of interest should be construed as awarding interest. While it is of course true that there was at one time respectable, if divided, authority to support that proposition, the Supreme Court's decision in Briggs v. Pennsylvania R. Co., 334 U.S. 304 authoritatively precludes that contention.

For, as we have shown in our main brief (pp. 15-18), the Supreme Court in Briggs held that the silence of an appellate mandate on the subject of interest precluded consideration of whether the plaintiffs were entitled to interest under the mandatory provisions of 28 U.S.C. 811, the predecessor to 28 U.S.C. 1961.

Appellees attempt to distinguish the Supreme Court's decision in Briggs on the ground that it concerned the award of pre-judgment interest, i.e., that it involved a mandate reversing a district court judgment (entered notwithstanding a verdict), rather than a mandate of affirmance (Brief for Appellees, pp. 16-17). But in so doing they miss entirely the Court's holding. The Court expressly refused to reach the issue of the applicability of the statute (28 U.S.C. 811, now 1961), on the ground that the question of entitlement to interest should have been presented and resolved on the initial appeal, and that the silence of the mandate on that issue therefore precluded its subsequent consideration. 334 U.S. at 307. In so doing, the Court relied primarily upon In re Washington & G. R. Co., 140 U.S. 91, where the mandate was one of affirmance, and where, as here, neither the district

court judgment nor the judgment of affirmance made an award of interest. 344 U.S. at 306-307. And following Briggs, the Seventh Circuit has reached the same result in the same circumstances. Steiner v. Nelson, 309 F. 2d 19, 21-22 (C.A. 7). See our Main Brief, pp. 17-18.

The judicial precedents 3/ relied upon by appellees fall chiefly into two categories: (1) cases, such as Blair v. Durham, 139 F. 2d 260 (C.A. 6, 1943) (discussed supra, pp. 4-6), which were decided prior to the Supreme Court's decision in Briggs; and (2) decisions in which the district court judgments expressly awarded post-judgment interest, so that the mandates of affirmance affirmed the awards of interest.

3/ Appellees also rely extensively upon two footnotes in a student note, Interest on Judgments in the Federal Courts, 64 Yale L.J. 1019 (Brief for Appellees, pp. 13-14). Appellees' quotations from this note also blur the distinction, basic to our case, between district court judgments which are silent on interest, and those which award interest. Moreover, appellees have failed to recognize a fact which the student author candidly conceded - namely, that his theory of "complete application" of 28 U.S.C. 1961 is wholly inconsistent with Briggs v. Pennsylvania R. Co., 334 U.S. 304, and that in his view "reason and authority are clearly opposed" to the Supreme Court's decision in that case. 64 Yale L.J. at 1031.

In Brown & Root v. American Home Assurance Co., 321 F. 2d 814 (C.A. 5, 1963), one of the cases "chiefly relied upon" by appellees, for example, the district court had entered a decree which denied relief on one claim, but awarded a specified sum of money, plus interest from the date of the entry of the decree. The court of appeals reversed the denial of the claim for towage, but affirmed the district court "in all other respects." As the opinion of the Fifth Circuit makes clear, it held only that a mandate which affirms a district court order providing for interest, affirms the award of interest.[4/] 321 F. 2d at 815. It seems hardly necessary to add that if appellees had requested the inclusion of a similar provision for interest in the district court judgments here, the issue of their entitlement to interest would

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4/ Similarly, in Eugene B. Smith & Co. v. Russek, 212 F. 2d 338 (C.A. 5, 1954); Bradford v. Commonwealth Trust Co., 98 F. 2d 655 (C.A. 3, 1938); City of Tacoma v. Hoffman, 72 F. 2d 721 (C.A. 9, 1934), and Myers v. Velasquez, 16 F. 2d 111 (C.A. 5), cited by appellees on p. 13, the district court judgments all contained express provision for interest. And in Harris v. Chicago G. W. Ry. Co., 197 F. 2d 829, 836 (C.A. 7), plaintiff made a timely application, prior to original appellate decision and issuance of the mandate, to include a provision for interest in the appellate mandate.

have been resolved on the original appeal.[5/]

Appellees rely heavily upon Rule 37 of the "Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure," the accompanying "Advisory Committee's Note," and to similar rules now in effect in other courts of appeals (Brief for Appellees, pp. 10-12). In the first place, the proposed rule has no application to the circumstances of this case, because it provides that upon affirmance "whatever interest is allowed by law shall be payable." The Rule does not address itself to the question of whether interest is allowed, when not provided for in the district court judgment which is affirmed without modification on appeal. Secondly, the Rules are preliminary only, and are now being studied by interested committees of associations and members of the bar, and will be subject to comment and change prior to adoption. Thirdly, even if this Court had such a rule which governed the situation

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5/ In the only other post Briggs decision relied upon by appellees, Moore-McCormick Lines v. Amgrault, 202 F. 2d 893 (C.A. 1, 1953), the only issue before the court was the question of allowance of interest from the date of complaint to judgment. The portion of the opinion quoted by appellees (pp. 14-15) is pure dictum. The question of post-judgment interest was not raised, and apparently was not briefed because the court did not refer to, and apparently was unaware, of the decision in Briggs.

at bar, such rules operate only when explicitly invoked, and do not operate of their own force. In re Washington & G. R. Co., 140 U.S. 91, 96; Consolidated Rubber Tire Co. v. Diamond Rubber Co., 232 Fed. 508, 509 (S.D. N.Y., per L. Hand, J.).[6/]

3. The Application of 31 U.S.C. 724a to the Judgments in This Case.

Appellees contend, without stated reasons, that the law of Maryland determines whether the judgments here were "judgments (not in excess of $100,000 in any one case)" within the meaning and coverage of 31 U.S.C. 724a. We have already shown that the Congressional objectives of simplicity, uniformity, and speed can be achieved only through the application of a uniform, Federal rule; and that, consistent with that intent, the statute was intended to apply to all judgments not in excess of $100,000 each (Main Brief, pp. 22-26, 30-32). Whether or not the law of Maryland would deem the individual awards to the

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6/ Other authorities are collected in Note, Interest on Judgments in the Federal Courts, 64 Yale L.J. 1019, 1024, fn. 23. Although the Supreme Court Rule 23, upon which the proposed uniform appellate rule is modeled, was not expressly mentioned in the Washington & G. R. Co. case, it was in force at the time of the decision. Rule 23, 108 U.S. 586. The same basic rule is presently found as Supreme Court Rule 58, and has provided a model for rules in nine of the eleven circuits.

plaintiffs here as judgments arising from one action, therefore, the awards to seven of the eight appellees here are judgments 7/ not in excess of $100,000 within the meaning and coverage of 31 U.S.C. 724a, and those appellees are therefore not entitled to post-judgment interest.

Appellees' attempt to equate the State of Maryland to the administrator of an estate does not hold water. The Tort Claims Act requires that all actions be brought "where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. 1403(b). If, as appellees now contend, the State of Maryland was the only plaintiff in cases under the Maryland Wrongful Death Act, then for accidents in that state, survivors of out of state decedents would be deprived of their right to bring an action in the state of their residence. But the real plaintiffs in this case, as all parties had recognized up to this time, are the individual survivors. And, if such individual survivors resided in different states, and they wished to do so, the Tort Claims Act

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7/ We do not understand appellees' argument as suggesting that there was but one judgment in all of these cases because there was only one piece of paper entitled judgment (Brief for Appellees, p. 22).

expressly gives them the right to bring separate actions in the states of their residence. Such rights are not to be defeated by the procedural formalities of local law. Similarly, the intent of Congress in enacting 31 U.S.C. 724a should not be frustrated by such formalities.

CONCLUSION

For the foregoing reasons, and those set forth in our main brief, the order and judgment of the district court should be reversed.

Respectfully submitted,

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October, 1964.

PETITION FOR REHEARING *EN BANC*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,676

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF MARYLAND for the use of
MARY JANE MEYER, ET AL.,

Appellees.

No. 18,677

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF MARYLAND for the use of
VANCE LEWMAN BRADY, ET AL.,

Appellees.

On Appeals from the United States District Court for The District of Columbia

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PETITION FOR REHEARING *EN BANC*

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Petitioners, State of Maryland for the use of Mary Jane Meyer, et al., in case No. 18,676, and State of Maryland for the use of Virginia Brady and Kendall Jesse Brady, Jr., in case No. 18677, respectfully present this, their Petition for a Rehearing *En Banc* in the above captioned cases, pursuant to Rule 26 of the Rules of this Court, and rely upon the following grounds for said petition:

The majority of the court has conceded that "the position of appellees is not devoid of support . . . ." (Op. 5). Petitioners respectfully ask the Court to reconsider the issue and to weigh the arguments presented herein in that light.

The judgments rendered in favor of the plaintiffs-petitioners in the above entitled actions were entered in the District Court on December 6, 1961 (Joint Appendix 11), and were affirmed by the judgment of the Court of Appeals June 13, 1963. The order on the mandate of the Court of Appeals was filed in the District Court on September 16, 1963, and judgment was entered in the District Court on September 16, 1963, pursuant to the opinion and mandate of the Court of Appeals (Joint Appendix 12, 13). Defendant-respondent, the United States of America, has not paid the judgment in either the Meyer or the Brady case, is not offering to do so, and is still attempting to reverse the judgments in said cases. The Conditional Petition of the Government for rehearing of the order denying the petition for the issuance of a writ of certiorari is still pending before the Supreme Court.

The judgment in the Brady case and the judgment in the Meyer case were entered in actions to recover damages for the wrongful deaths of the pilot and the copilot of a Capital Airlines plane. These men were

killed on May 20, 1958, as the result of the alleged negligence of an employee of the United States of America. The judgment in the Brady case and the judgment in the Meyer case was each entered "in one case." The survivors of Paul Frank Meyer, his widow Mary Jane, and his three minor children, have not obtained and are not able to obtain payment of the judgment in which each of them is entitled to share. Nor has Virginia Lewman Brady and Kendall Jesse Brady, Jr. been paid or are they able to obtain payment of the judgment rendered by reason of the death of their father Kendall Jesse Brady, in which judgment they are entitled to share.

It is assumed in the majority opinion that by filing a transcript of the judgment in the General Accounting Office each member of the Meyer family and of the Brady family, whose individual share of those two judgments was less than $100,000.00, "would have been paid" (Op. 5). It is respectfully suggested that this is an erroneous assumption. Although a transcript of the judgment in the Meyer case and of the judgment in the Brady case could have been filed in the General Accounting Office, the individuals involved, whose respective shares of those judgments were less than $100,000.00, would not have been paid in the ordinary course of business and had no way of compelling payment of their shares. And it would be wholly unrealistic to think the Government would have paid the said judgments, or any portions of them, in view of the fact that the Government, throughout the period in question and up to the present time, is attempting to appeal from the judgment of the District Court entered December 6, 1961.

Even if it were assumed, which petitioners deny, that 31 U.S.C. § 724a (Supp. V, 1959-63) was applicable to each share of the judgments in these two cases which amounted to less than $100,000.00, the Government has not been prejudiced by the failure of the claimants to file a transcript of the judgment in the General Accounting Office in view of the fact that the Government has not shown any disposition to pay those

awards, which were less than $100,000.00, out of the two judgments involved.

Thus, the Government has been able to withhold payment of the two judgments involved, or of any portion of those two judgments, and at the same time to escape the obligation imposed by 28 U.S.C. § 2411(b), which provides that interest shall be payable on final judgments against United States entered under the Federal Tort Claims Act, computed at the rate of 4% per annum from the date of judgment up to but not exceeding 30 days after the date of approval of any appropriation act providing for payment of the judgment. The language of that provision clearly contemplated an equitable result whereby interest would accrue on any final judgment against the United States until the United States took action to pay the money due under the judgment. The construction now given to 31 U.S.C. § 724a, which petitioners contend is entirely inapplicable because the two judgments involved each are in excess of $100,000.00, accomplishes the highly inequitable result of denying interest on judgments, no part of which has been paid and which the United States shows no intention of paying. This result cannot fairly be reconciled with the intent of Congress to allow interest on judgments against the United States rendered under the Federal Tort Claims Act.

31 U.S.C. § 724a contains language which has not been given any real meaning or effect by the majority opinion. That section provides that funds are appropriated in the treasury and postal revenues as necessary for payment "as certified by the Comptroller General, of judgments (not in excess of $100,000.00 in any one case) . . ." and "interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance . . . ."

A fundamental rule of statutory construction requires that meaning be given to all words used in the statute if possible to do so. The obvi-

ous and real meaning of the words "not in excess of $100,000.00 in any one case" have not been given any meaning in the majority opinion. Reasonably construed, the language referred to must mean that 31 U.S.C. § 724a is not applicable where the judgments are "in excess of $100,000.00 in any one case." But the majority opinion has construed this statute as though the words "in any one case" had not been used in the statute. However, it must be assumed Congress inserted that phrase for a definite purpose, and the discussion that preceded the passage of 31 U.S.C. § 724a shows clearly that Congress did not intend to and in fact declined to give the Comptroller General jurisdiction over all judgments against the United States under the Federal Tort Claims Act.

As this Court pointed out in the dissenting opinion, p. 9, judgments in excess of $100,000.00 "in any one case" were "by virtue of the legislation . . . beyond the power of the Comptroller General to satisfy." In a letter dated March 8, 1956, by Percy Rappaport, Assistant Director of the Bureau of the Budget, to Mr. Kenneth Sprankle, House Committee on Appropriations, concerning the proposed bill, in which the plan to expedite payment of judgments was outlined, setting forth the proposal in language prepared in consultation with the Department of Justice and the General Accounting Office, it was stated, p. 3:

> "Present Proposal: The action of the House Appropriations Committee on the General Accounting Office proposal in 1953 seems to indicate that the Congress is unwilling to relinquish completely its control over appropriations for the payment of judgments. However, in view of the interest costs and delays entailed by the present procedure, it may be that the Congress would consider a permanent indefinite appropriation for the payment of judgments up to a specified figure while at the same time it retained the present procedure of making a specific appropriation for judgments in amounts above that figure.

> ". . . A substantial improvement in the existing situation could be effected by continuing the existing practice of making specific appropriations for each judgment in excess of $100,000.00 but providing a permanent indefinite appropriation to permit prompt payment without further Congressional approval of judgments not in excess of $100,000.00 in any one case." (Emphasis ours.)

It is submitted that this language, reasonably construed, and as embodied in 31 U.S.C. § 724a, leads to the definite conclusion that where the judgments "in any one case" reach a total greater than $100,000.00, it is outside the jurisdiction of the Comptroller General to certify for payment. Otherwise, why was the language "in any one case" added, to find a compromise and to induce Congress to relinquish its control over appropriations for the payments of judgments that did not exceed that amount "in any one case." While the language employed might have been less ambiguous, can there by any doubt that Congress thought it was relinquishing control to the Comptroller General only in those cases where the judgments "in any one case" did not reach a total in excess of $100,000.00?

If the statute is read as though it did not contain the words "in any one case," the identical result would be reached that was reached by the majority opinion in the instant case. This should serve to show that the majority opinion simply gave no effect whatsoever to the language which Congress apparently insisted be included in the statute in order to limit the extent of the authority which it relinquished to the Comptroller General in this area.

Was each amount awarded or apportioned to the children and widow of the decedent Paul Frank Meyer, and to the children and widow of the decedent Kendall Jesse Brady, a separate judgment or, in all fairness and on the basis of applicable Maryland law, should those separate awards be considered as part of a judgment in the amount of $170,000.00

in the case of Paul Frank Meyer, and $248,000.00 in the case of Kendall Jesse Brady? That question cannot be answered correctly without reference to the law of Maryland. The statute creating the right, to which we must look under the Federal Tort Claims Act, is the Maryland Wrongful Death Statute, Article 67, §§ 1, 4. Section 1 of that statute provided at the time of the death in May 1958, that "**an action** for damages" shall lie against the parties responsible for causing the deaths. Section 4 provides that "**every such action** shall be brought by and in the name of the State of Maryland" for the person or persons entitled to damages, and that "**in every such action** the jury may give such damages" as are warranted by the injury and death, "and **the amount** so recovered . . . shall be divided amongst" the widow, child, etc.; and "that **not more than one action** shall lie" to recover damages by reason of the death. (Emphasis ours.) This statute, which created the right of action for wrongful death, also controlled the manner in which the action had to be brought and prosecuted.

It was not merely a matter of "convenience of litigation in Maryland" (Majority Op. 4) but bound the claimants whenever and wherever the action might be brought. It was a protection for each and every claimant as well as for the defendant that **only one action** would lie against a person liable. As pointed out in the brief for appellees, pp. 25-27, these conditions for bringing the action imposed by the Maryland Wrongful Death Statute were mandatory and any equitable plaintiff who did not join would be excluded from bringing a subsequent action, *State of Maryland for the use of Bashe v. Boyce*, 72 Md. 140 (1890); *Dexford v. State, etc.*, 30 Md. 208. The capacity of a party to maintain an action against the United States under the Federal Tort Claims Act is governed by the law of the forum in which the wrongful act or omission occurred; 28 U.S.C. Sec. 1346(b); Anno. 1 L. ed. 2d 1647, at 1663.

The widows and children of Brady and Meyer could not have brought separate actions individually in their own names in the State of Mary-

land or elsewhere under the Maryland Wrongful Death Act. The general rule is that the action can be maintained only in the name of the person designated by the statute and that the right of the particular person to maintain the action is as essential as the liability of the defendant, 16 Am. Jur. Death, § 262, pp. 179, 180; Harper and James, The Law of Torts, Vol. 2, § 30.5, p. 1695. To the same effect are: *Heath v. United States*, 85 F. Supp. 196 (D.C. Ala. 1949), claim under the Federal Tort Claims Act for death which occurred in Alabama; *Kunkel v. United States*, 140 F. Supp. 591 (D.C. Cal. 1956); and *Olson v. United States*, 175 F.2d 510 (8th Cir. 1949).

The Maryland Wrongful Death Statute provided that there should be only one amount recovered ("the amount so recovered"), as awarded by the jury (by the judge in a Federal Tort Claims Act case), and that this amount "shall be divided" amongst the parties entitled to share. If the district judge had simply awarded a single total amount in the Meyer case of $170,000.00 and had refused or neglected to apportion that amount between the widow and children of the decedent of Paul Frank Meyer, leaving that to be done by the Probate Court of the county where Meyer resided at the time of his death, the Government could not have successfully claimed any error was committed.

In passing on this specific contention, where a jury awarded the amount of total damages under the Maryland Wrongful Death Act but did not divide it between the equitable plaintiffs, the court held, in *Passapae v. Oehring*, 141 Md. 60 (1922), that the defendant had no grounds for complaint because of the failure of the jury to determine "the shares" in which the amount recovered should be received by the parties for whose benefit the action was brought, and that the purpose of the statute was that the jury should award damages first "as an aggregate sum" in their verdict, and that "this has been the general practice." The court further indicated that the only thing the defendant was concerned with was the whole amount of the damages sustained and this amount was

definitely stated by the jury verdict. The court further stated that the defendant's interest was limited to the amount of the damages, not their apportionment. In accordance with this view, in *Central Vermont R. Co. v. White,* 238 U.S. 507, where virtually the identical contention was made by the railroad, that the judgment should be set aside because the damages had not been apportioned between the widow and children but that on the contrary a single total amount had been rendered, the Supreme Court held that only a few American states require the jury to apportion the damages in cases of this nature and that even in those cases "the distribution is held to be of no concern to the defendant ...."

If it be true that there would be no basis whatsoever for the Government's contention that 31 U.S.C. § 724a was applicable if the District Court had awarded the full $170,000.00 in the Meyer case in a single lump sum and had not apportioned it, shall the mere fact the court went further and apportioned the respective amounts to which the equitable plaintiffs were each entitled serve as a basis for holding that each separate amount so apportioned is a separate judgment, that it is covered by 31 U.S.C. § 724a which applies only to "judgments," and for further holding that each separate award is a judgment not in excess of $100,000.00? Surely this is not carrying out any intention of Congress and is a stretching and distortion of the plain meaning of 31 U.S.C. Sec. 724a which was intended by Congress to relinquish authority over judgments in Federal Tort Claims Act cases only where the judgments "in any one case" were not in excess of $100,000.00 altogether.

This issue has become very important here because this construction will serve to deprive the widow of Paul Frank Meyer, and the children of both decedents, of interest on the judgments rendered in each case, an amount which has now reached a total of many thousands of dollars. Any other private person who had not paid a judgment, would owe interest on that judgment. The construction adopted by the court tends to deprive these persons of interest on the judgment simply be-

cause a piece of paper, a transcript of the judgment, was not filed in the General Accounting Office. The failure to file that transcript did not prevent the Comptroller General from paying the judgment if he saw fit to do so. The fact is: the Comptroller General and the other departments of the government involved decided not to pay the judgment in the Meyer or the Brady case or any part thereof.

The dissenting opinion points out with unerring accuracy that the majority opinion has treated the individual awards under the judgment in the Meyer case and the individual awards under the judgment in the Brady case, to the respective survivors, "as though each award was the result of a spearate 'case'" (Op. 8). But, as Judge Danaher states, the Meyer action, as well as the Brady case, could only be brought as "one case," and the final judgment in each of those two cases unquestionably exceeded $100,000.00 (Op. 11). It becomes evident that the majority opinion rests entirely on the tenuous grounds that the trial judge apportioned the amounts between the widow and children, which he need not have done, and which properly should have been done under the law of Maryland only after first determining the total damages due or properly allowable for the death. As Judge Danaher stated "It makes no difference that the judgment was apportioned as was provided in the Maryland statute instead of running nominally in favor of the State of Maryland . . . ." (Op. 11). It is respectfully submitted that the result reached by the majority is based on a misconception as to the applicable law of Maryland, and as to the limitations of the jurisdiction of the Comptroller General to certify judgments for payment under the provisions of 31 U.S.C. § 724a.

The majority opinion refers to the requirement under Maryland law that only one action be brought for the death as a provision having "no purpose related to the liability of the United States for interest" but only as a purpose "related to the convenience of litigation in Maryland" (Op. 4). This conclusion is apparently based upon the decision of the Comp-

troller General, relied upon by respondent. *Harue Hayashi*, Decs. Comp. Gen. 307 (1960), is correctly distinguished however in the dissenting opinion (Op. 11) because that action rested upon Rev. L. Hawaii, § 246-2, which permits an action for wrongful death to be brought either by the decedent's legal representative or by any of the enumerated next of kin.

In *United States v. Harue Hayashi*, 282 F.2d 599, at 605 (1960), the court observes that prior to the passage of 1955 Rev. Laws Hawaii, § 246-2, the Wrongful Death Statute under which that action was brought, there was both a statutory and common law right of action for wrongful death in Hawaii. The statutory action could be brought by any dependent, regardless of relationship to the deceased. The common law action, which was unique since generally there is no common law right of action for wrongful death, Harper and James, Law of Torts, Vol 2, § 24.1, p. 1284, was available to the husband, wife, parent and child. The new statute, enacted in 1955, under which the action was brought, n. 11, combined both causes of action and provided it could be brought by deceased's legal representative or any persons enumerated (surviving spouse, children, father, mother, dependent) for the damage suffered as a result of the death. The Comptroller General of the United States, 40 Comp. Gen. 307, at 308, construed this statute as granting each plaintiff a cause of action which he "could have sued individually," so that the joinder of all in one action was merely a matter of "convenience."

Joinder of the equitable plaintiffs under the Maryland Wrongful Death Act was not merely a matter of convenience, as the majority opinion erroneously concluded (Op. 4), but, as the dissenting opinion pointed out (Op. 11), was "mandatory," and "we are not dealing with permissive plaintiffs," (Op. 11, n. 10). Instead of each claimant having the right to bring his own action, the Maryland statute expressly provided that only "one action shall lie . . ." The liability of the United States is determined in accordance with the law where the act or omis-

sion occurred, 28 U.S.C., § 1346(b), and it was the duty of the court to apply the "whole" law of Maryland. *Richards v. United States*, 369 U.S. 1, 7 L. ed. 2d 492, 82 S. Ct. 585 (1961). However, in passing upon this crucial issue, the majority opinion (Op. 4) held that the Federal interest statute would be construed and applied to its own purposes and meaning, that the judgment:

> ". . . is not necessarily to be construed as 'in any one case' because only one action for each death was filed according to Maryland law. This requirement of Maryland has no purpose related to the liability of the United States for interest. Its purpose is related to the convenience of litigation in Maryland."

It is submitted this analysis of the applicable law and the refusal to follow and apply the law of Maryland was not in accordance with spirit, intent and language of the Federal Tort Claims Act or the decisions of the Supreme Court.

Finally, it is important to note that at all times in these proceedings the court has referred to a "judgment" in the Meyer case, and to a "judgment" in the Brady case (J.A. 2, 11, 12, 13). Suit was brought in the Meyer case for one single amount in behalf of the widow and children (J.A. 8), and the same was true in the Brady case. Some weight should be attached to the understanding of the District Court judge. He stated that a "judgment" was rendered for the death of each decedent awarding certain sums of money to the widow and children of each deceased, and that while the sum awarded to each was less than $100,000.00 (other than Vance Lewman Brady), "the sum total awarded by the judgment is in excess of that amount." It was his understanding that only one action would lie for the wrongful death of any person under the Maryland statute, and that there was a single action "and a single judgment although the judgment directs payment of specific sums to various dependents." He concluded that the final judgment in the case was in excess of $100,000.00 and that the provisions of 31 U.S.C. § 724a were not applicable (J.A. 14, 15, 16).

It is therefore respectfully submitted that a construction has been adopted which is not reasonable, and that it is permitting the Government, which has not paid and is not offering to pay the judgments or any part of them, to withhold the money awarded by the court in December 1961, to deprive the next of kin of the decedents of those funds and also to deny interest thereon.

Petitioners therefore respectfully ask this Court to grant a rehearing *en banc*, and to set aside that portion of the judgment of the Court which reversed the order of the United States District Judge "as to Mary Jane Meyer, Paul Jeffrey Meyer, Susan Lynn Meyer, Pamela Ann Meyer, Virginia Brady, and Kendall Jesse Brady, Jr." It is believed that the reference to Austin F. Canfield, Jr., as ancillary administrator, in the order of reversal, is unnecessary and should be omitted in view of the fact that Canfield sued in a different and distinct capacity, as ancillary administrator, to recover funeral bills, and that the award to him was not embraced under the award of interest in the order entered by the District Court on April 20, 1964.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, one of counsel for Petitioners, do hereby certify that the foregoing Petition for Rehearing *En Banc* is presented in good faith and not for purpose of delay.

Richard W. Galiher

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Petition for Rehearing *En Banc* on David L. Rose, Esq., Counsel for Appellant, this 26th day of March, 1965, at his last known post office address, Department of Justice, Washington, D. C.

Richard W. Galiher